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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether meals and lodging furnished without charge to employees for the convenience of their employer, and therefore admittedly not "wages" subject to withholding for Federal income tax purposes, are nonetheless "wages" subject to Social Security (FICA) and Federal Unemployment Insurance (FUTA) taxes.

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OCTOBER TERM, 1980

No. ____

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Rowan Companies, Inc. ("Rowan"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 22, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 624 F.2d 701, is reproduced in its entirety as Appendix A, *infra*, [1a — 12a]. The order reviewed below, of the United States District Court for the Southern District of Texas, issued without opinion and not reported, is reproduced in its entirety as Appendix B, *infra*, [13a].

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 3101, 3102, 3111, 3121, 3301, 3306, 3401 and 3402 of the Internal Revenue Code of 1954 (26 U.S.C. (1971 ed.)), and of Treasury Regulations on Employment Tax §§31.3121(a)-1, 31.3306(b)-1 and 31.3401(a)-1, (26 C.F.R.) are set forth in Appendix C, *infra*, 14a — 18a.

STATEMENT

This action was brought by the petitioner, Rowan Companies, Inc. ("Rowan"), in the United States District Court for the Southern District of Texas, under 28 U.S.C. §1346, for refund of FICA and FUTA taxes alleged to have been wrongfully assessed and collected from Rowan by the Internal Revenue Service.

The essential facts are undisputed. During the years in issue — 1967, 1968, and 1969 — Rowan owned and operated a number of land-based and off-shore oil and gas drilling rigs. (R.1-2,5,30,56,99,109-111;[1] Appendix A, *infra*, 2a.) It operated its land-based rigs with a crew which normally worked six days a week on a seven or eight-hour shift, with each man going home at the end of his shift each day (R. 94). By contrast, Rowan's off-shore rigs were operated up to sixty miles off shore; it was not practical for the off-shore crews to leave at the end of each shift and consequently two crews were kept

[1] "R." references are to the record on appeal.

at the rig at all times, with each crew working a twelve-hour shift for ten consecutive days; every five days one of the crews went ashore for five days off and meanwhile a new crew came to the rig (R. 197,63-64, 79-80,94, 136; App. A, *infra*, 2a — 3a). Because of the cost of transporting crews to and from shore at the start and end of each shift, lodging at the rig and three meals a day at the rig cafeteria style were provided at Rowan's expense for each crew member for each of the ten days he remained at the rig (R. 67,80,83, 112, 119,139-140,146-147,190,193; App. A, *infra*, 2a). Each member of each crew was furnished a meal before and after his shift and a third meal on a staggered basis in the middle of his shift (R. 150-151). The cost to Rowan of providing transportation ashore at the beginning and end of each shift — typically two hours in and two hours back — would have been $275 to $350 per day for each crew or roughly $25 per man, as compared to a cost to Rowan of about $6 per day per man for providing such meals and such lodging at the rig (R. 146-147, 190,193, 38). When a crew was off duty, its members were not expected to perform any services, nor was a crew member expected to assist in any work at his own mealtime (R. 153-154, 193).

Rowan's employees were not unionized and there was no agreement with them individually or collectively to furnish food and lodging (R. 100,142,193; App. A, *infra*, 2a). The type of food and lodging furnished was the same for all crew members, irrespective of pay scale, and for all employees of other employers working on the drilling rig (with reimbursement to Rowan by such employers) (R. 193;40,84,99-100,108-111; App. A, *infra*, 2a). They got no cash allowances if they refused such meals or lodging and Rowan was not obligated to fur-

nish transportation to and from shore except at the time of crew changes (R. 146-147, 193; App. A, *infra*, 2a). No meals or lodgings were provided to crew members during their off duty days and they had to obtain meals and maintain regular lodging ashore at their own expense.

Although paid substantially the same cash wages, crew members on Rowan's land-based rigs, who went home each day, were not furnished meals or lodging (R. 94,63-64,71-72).

Rowan did not include the value of meals and lodging furnished the off-shore employees in computing an employee's wages for purposes of income tax withholding or FICA or FUTA tax purposes.

The Government concedes that such off shore meals and lodging were furnished for the convenience of taxpayer as an employer and accordingly do not constitute "wages" subject to income tax withholding (App. A, *infra*, 3a). Nevertheless, the Government asserts that the meals and lodging are "wages" for FICA and FUTA tax purposes, and it assessed a deficiency against Rowan based on including a fair market value of $6 per day per man for such meals and lodging in the base for withholding employee FICA tax and computing employer FICA and FUTA tax (R. 2,5, 19-21,38; App. A, *infra*, 3a). Rowan paid such taxes and thereafter, after filing timely claim, filed this suit for refund of such taxes.

The district court granted a Cross-Motion for Summary Judgment filed by the Government, and the court below affirmed.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Conflicts With Recent Decisions Of This Court, Of The United States Courts Of Appeals For The Fourth And Seventh Circuits, And Of The United States Court Of Claims

A. The decision admittedly conflicts with decisions of the Fourth and Seventh Circuits and the Court of Claims

The court below recognizes that its decision is directly contrary to the recent decisions of the United States Court of Appeals for the Fourth Circuit in *Royster Co.* v. *United States,* 479 F.2d 387 (1973), and the United States Court of Appeals for the Seventh Circuit in *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (1980), holding "that the term 'wages' has the same essential meaning in the [income tax] withholding, FICA and FUTA tax statutes." App. A, *infra*, 8a, 11a.[2]

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[2] The court below purports to follow *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (C.A. 6th, 1967) and *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (C.A. 9th, 1943). It must be noted, however, (1) that irrespective of what was stated in those cases as to the "convenience of employer" test being inapplicable to meals and lodging for FICA and FUTA purposes, such statements are *dicta* since in each case it was specifically found that the meals in those cases were not furnished as a convenience to the employer, but as compensation for specific work done (*Kresge,* 379 F.2d at 310; *Pacific American Fisheries*, 138 F.2d at 466) — making such cases clearly distinguishable on the facts from the instant case, and (2) that, as noted by the Court of Claims in *Conquistador*, whatever precedential value such statements may have had, they are, in any event, no longer viable as precedents in the light of this Court's subsequent decision in *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21 (1978), discussed at pp. 8 — 10, *infra*, specifically rejecting a broad and sweeping definition of "wages" for employment tax purposes.

The court below also recognizes that its decision is contrary to the recent decision of the Court of Claims in *Hotel Conquistador, Inc.* v. *United States,* 597 F. 2d 1348 (1979), *cert. denied*, 444 U.S. 1032, 100 S. Ct. 702, 62 L. Ed. 2d 668 (1980), that cafeteria meals furnished hotel employees for the convenience of the employer were not "wages" for FICA and FUTA tax purposes. App. A, *infra*, 11a.

The Internal Revenue Code imposes four different forms of "employment tax": (1) income tax withholding required of employers under Section 3402; (2) employee income tax under the Social Security Act (FICA) required to be withheld by employers under Sections 3101 and 3102;[3] (3) employer excise tax under the Social Security Act (FICA) payable by employers under Section 3111; and (4) employer excise tax (FUTA), payable by employers under Section 3301. All four employment taxes are imposed on "wages". App. C, *infra* 14a — 16a.

"Wages" are defined by statute for income tax withholding purposes in Section 3401 as "all remuneration . . . for services performed by an employee for his employer," and — as admitted by the court below (App.

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[3] The court below twice erroneously refers to the FICA tax on employees and employers alike as an "excise" tax. App. A, *infra*, 3a, 4a. Section 3101(a) and (b) specifically imposes FICA tax "on the income" of employees, as contrasted to Section 3111 (a) and (b) which specifically refers to the imposition of "an excise tax" on employers. In view of this Court's determination in *Central Illinois, supra,* that the concept of "wages" is narrower than that of "income" (435 U.S. at 25, 29-31), and the obvious Congressional intent that the employer FICA and FUTA excise taxes be imposed on the same base as the employee FICA income tax (26 U.S.C. §3121, 3306), it would seem clear that if meals and lodging are not income, they necessarily are not "wages" for purposes of any of the employment taxes.

A, *infra*, 4a (fn. 3), 6a) — defined in essentially identical terms for FICA and FUTA tax purposes in Sections 3121 and 3306 as "all remuneration for employment." (App. C, *infra*, 15a). For over 60 years, meals and lodging furnished employees for the convenience of the employer have been recognized as not being "remuneration for services" and therefore not "wages" for income tax purposes.[4]

Immediately prior to and during the pendency of this case *the Government* repeatedly recognized the identity of the meaning of the term "wages" for all employment tax purposes. After specifically referring to the statutory definition of "wages" for FICA, FUTA and income tax withholding purposes, the Government told the Fourth Circuit on brief in *Royster, supra*, — which involved all four employment taxes — that:

> "In view of the similarity of these definitions we agree with the District Court's conclusion . . . that the term 'wages' has the same meaning for all of the employment taxes involved." Gov't Brief, p. 6.

The Fourth Circuit agreed, holding that meal reimbursements there involved were not subject to income tax withholding, FICA, or FUTA tax. 479 F.2d at 390.

Then, when the FICA and FUTA tax were before the Court of Claims in *Conquistador*, and the Government was seeking to rely on the decision of the Seventh Circuit in *Central Illinois Public Service Co.* v. *United States*, 540 F.2d 300 (1976), later reversed by this Court, 435 U.S. 21 (1978), the Government advised the Court of Claims:

> "Because the term 'wages' has the same meaning under all the employment taxes, [the decision of the

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[4] See pp. 10-11, *infra*.

> Court of Appeals in *Central Illinois,* involving income tax withholding on meal reimbursements] is squarely in point here." (Emphasis added).[5]

And, even in the instant (*Rowan*) case, the Government originally told the court below that *Central Illinois*, as "then pending before the Supreme Court . . . involved 'the same, substantially the same or related issues' as those involved in the present appeal."[6]

B. The decision below conflicts with the decision of this Court in *Central Illinois* rejecting a broad and sweeping definition of "wages" for employment tax purposes.

In *Central Illinois* this Court two years ago rejected the Government's argument that lunch payments of $1.40 per meal received by employees pursuant to a collective bargaining agreement negotiated by the employees' union were "wages" so as to be subject to income tax withholding. 435 U.S. at 29. There, as here:

> "The employee on travel status rendered no service to the Company during his lunch. He was off duty and on his own time. He was subject to call, however, as were all employees at any time as emergencies required. The lunch payment was unrelated to the employee's specific job title, the nature of his work, or his rate of pay. '[T]his lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in travelling back and forth as well as the usual travel expenses.' " 435 U.S. at 23.[7]

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[5] Gov't Brief in support of Cross-Motion for Summary Judgment, p. 22, fn. 8.

[6] Gov't Motion for Extension of Time, March 28, 1978, p. 1.

[7] See pp. 22-23, *infra.*

The Government had contended that since the "payments at issue were a result of the employment relationship and were a part of the total of the personal benefits that arose out of that relationship," they necessarily constituted "wages." *Id.* This Court rejected such "expansive and sweeping definition of wages," finding it to be inconsistent with the Congressional purpose of setting forth a standard "intentionally narrow and precise." 435 U.S. at 31. This Court emphasized that the tax base is limited to "wages" and that such term is limited by the withholding statute to mean "all remuneration . . . for services performed by an employee for his employer," 435 U.S. at 29, essentially the identical language of the FICA and FUTA statutes.[8]

While recognizing the essential identity of statutory language and even acknowledging that "the factors considered in *Central Illinois Public Service* apply here as well," the court below refused, in light of a purportedly consistent contrary Government interpretation of the FICA and FUTA statutes[9], to apply *Central Illinois* in the instant case. (App. A, *infra*, 10a — 12a.) In view of the Government's repeated acknowledgement of the identity of the issues, and recognition by the Seventh Circuit[10] and the Court of Claims[11] of the applicability

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[8] In reversing the Seventh Circuit in *Central Illinois*, this Court followed the earlier view of *Royster, supra*, 435 U.S. at 31. Although reaching a different conclusion than *Royster* as to whether meal reimbursements were subject to tax, the Seventh Circuit had itself agreed in *Central Illinois* with *Royster* that "wages" has the same meaning for FICA, FUTA and withholding tax purposes. 540 F.2d at 302, fn. 2.

[9] The Government has actually not been consistent, having changed its interpretation of the FICA and FUTA statutes at least five times. See fn. 18, *infra*.

[10] *Oscar Mayer & Co.* v. *United States*, 623 F.2d at 1225-28.

[11] *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d at 1351-52, 1354.

of *Central Illinois* to FICA and FUTA tax determinations, the failure of the court below to follow such decision is in error.

C. There is no basis for the conclusion of the court below that special "latitude" was given the Treasury to promulgate regulations defining "wages" differently for FICA and FUTA tax purposes than for purposes of income tax withholding and that, because of the Treasury's pronouncements meals and lodging furnished for convenience of the employer must be treated as "wages" for FICA and FUTA purposes.

Repeated Administrative and Judicial Recognition that Meals and Lodging for the Convenience of the Employer Are Not Wages or Income. Although income tax withholding was not adopted until 1942, meals and lodging furnished to employees for the convenience of their employer have been consistently regarded as noncompensatory in nature and therefore not income[12] for purposes of income tax. Thus, even though the Revenue Acts as early as 1918 specifically defined income as including "wages . . . of whatever kind and in whatever form paid" (Section 213, Revenue Act of 1918, 40 Stat. 1057), the regulations and rulings issued by the Bureau of Internal Revenue as early as 1918 directly recognized that such term did not include the value of "board" or "living quarters . . . furnished to employees for the convenience of the employer." Reg. 45, Art. 33 (1918);

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[12] This Court noted significantly in *Central Illinois* that "wages" is a narrower term than "income". 435 U.S. at 25, 29-31.

O.D. 265, 1 Cum. Bull. 71 (1919); O.D. 514, 2 Cum. Bull. 90 (1920). This principle was repeatedly reiterated by the Government in rulings and regulations in the 1920's, 1930's, and 1940's and — as recently pointed out by this Court in *Commissioner* v. *Kowalski,* 434 U.S. 77 at 88, fn. 21 (1978) — also received during this period the repeated approval of the courts. Finally, in 1954 the rule was codified (as it exists today) in Section 119 of the Code, with the added requirement, however, that in order to be excluded, such meals must be furnished on the business premises of the employer.

Vacillation by the IRS for FICA and FUTA Purposes. The Government has, nevertheless, from time to time, as in this case, ruled that such meals and lodging are wages within the meaning of the FICA and FUTA statutes, and the court below relied on Regulation 106, Section 402.227, and Regulation 107, Section 403.227, issued in 1940 (and now codified as §31.3121(a)-1(f) and 31.3306(b)-l). Such regulations contained identical language on this point, which, after providing that "facilities or privileges" furnished employees do not ordinarily constitute remuneration for employment, stated:

> "The term 'facilities or privileges,' however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees."

Contrary, however, to the emphasis placed by the court below on such rulings and regulations and its suggestion that such "interpretations [having] long continued without substantial change" they should be followed by the courts (App. A, *infra,* 4a — 5a, 10a — 11a), the

Government has *not* consistently construed the FICA and FUTA statutes or regulations as requiring taxability of meals such as are here involved.

Immediately after the enactment of the Social Security Act in 1935 (49 Stat. 636), the Treasury in 1936 promulgated Regulation 90, Article 207 (relating to the FUTA tax) providing that:

> "Ordinarily, facilities or privileges (such as . . . cafeterias, restaurants . . .), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely *as a convenience to the employer* or as a means of promoting the health, good will, contentment, or efficiency of his employees." (Emphasis added.)

This contemporary interpretation of the statute is, of course, precisely the position now taken by Petitioner.

In 1937, the then Bureau of Internal Revenue issued S.S.T. 110, 1937-1 Cum. Bull. 440, holding "supper money" paid an employee who worked overtime for the convenience of the employer as not constituting "wages" for purposes of what are now referred to as FICA and FUTA taxes.[13] S.S.T. 192, 1937-2 Cum. Bull. 449, was later issued in 1937 and provided that lunches served employees could constitute "wages" for FICA and FUTA purposes. However, this ruling was revoked the next year by S.S.T. 302, 1938-1 Cum. Bull. 456, which

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[13] It is important to note that the Bureau cited as authority for its FICA decision in S.S.T. 110 its previous income tax ruling, O.D. 514, 2 Cum. Bull. 90, issued in 1920, which held that "supper money" furnished under such conditions did not represent taxable income to an employee for income tax purposes.

held that, if furnished for the convenience of the employer, such meals would not constitute "wages" for FICA and FUTA tax purposes,[14] citing as authority Reg. 90, Art. 207, *supra*; Reg. 91, Art. 14, *supra*; and S.S.T. 110, *supra*.

Legislative Intent that the Tax Base be the Same for All Employment Taxes. The Victory Tax provisions of the Revenue Act of 1942 (56 Stat. 884) added to the Internal Revenue Code of 1939, Sections 465 to 470 (effective from January 1 to June 30, 1943), and the Current Tax Payment Act of 1943 (57 Stat. 126) added to the Code Sections 1621-1632 (effective on a permanent basis July 1, 1943), requiring employers to withhold income tax due on "wages" paid their employees.

In doing so, the Congress expressed a clear intent to adopt as a definitional base for withholding of income tax the identical base previously adopted for Social Security taxes.[15] After noting that income tax

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[14] The holding in S.S.T. 302 that FICA and FUTA taxes would not apply referred to the following facts:

> The M Company has now established that the free lunch privileges are afforded solely to promote its own interests; that the wage scale of its employees has not been lowered to reflect the value of such items; that the lunches are not furnished as additional compensation for services; that such lunches are voluntarily offered to the employees; and that the lunches are furnished for the convenience of the M Company, and benefit the company by promoting the health, good will, and efficiency of its employees.

All of these circumstances apply here.

[15] The understanding of the Congress that the base is the same for all employment taxes was reiterated as recently as 1978 when Section 119 was amended so as to make clear that the exclusion applies to meals furnished an employee for the convenience of the employer, although the employer imposes a partial charge for the meal. H.R. 12841, 95th Cong., 2d Sess., Section 4, enacted into law as P.L. 95-427. In answer to a specific inquiry on the floor of the

withholding (like the FICA and FUTA tax) was to be imposed on "wages", the report on the Victory Tax stated that:

> "*With certain specified exceptions*, the term is defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer . . . *[t]hese exceptions are identical with the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope.*" (Emphasis added.) S. Rep. No. 1631, 77th Cong., 2d Sess. 166 (1942).

In extending income tax withholding the next year, the Committee reports stated

> "The general definition of the term 'wages' contained in section 465(a) is the same as that contained in existing law." H.R. Rep. No. 268, 78th Cong., 1st Sess. 14 (1943).
>
> * * *
>
> "The general term 'wages' contained in section 1621(a) is the same as that contained in the House bill and in section 465(a) of the code." S. Rep. No. 221, 78th Cong., 1st Sess. 17 (1943).[16]

Senate as to the effect of the bill on "income tax withholding, social security (or FICA) tax, and unemployment (or FUTA) tax," Senator Long, Manager of the bill containing the amendment, responded that it was understood that "an item excluded from gross income will also be excluded from the definition of 'wages' for all payroll tax purposes." (Cong. Rec. S12367 (daily ed. Aug. 2, 1978)). Astonishingly, the court below cites Senator Long's statement as indicating an awareness by "some members of the Cop-ngress" that the FICA and FUTA regulations interpreted "wages" differently than the regulations applicable to income tax withholding. App. A, *infra*, 10a (fn. 10).

[16] That these were deliberate decisions of the Congress to simplify recordkeeping by taxpayers, and administration by the Government, see pp. 19—21, infra.

The Internal Revenue Service almost immediately issued Regulation 115, Section 404.101, providing that:

> "If . . . living quarters or meals are furnished to an employee for the convenience of the employer, the value thereof need not be included as wages subject to withholding."

This was, of course, long before the "convenience of the employer" rule was codified in Section 119. Such contemporaneous interpretation of this particular employment tax statute is highly significant.

Despite such clear Congressional understanding that the term "wages" was to be construed alike for purposes of all employment taxes, Mim. 5657, 1944 Cum. Bull. 550, was issued in 1944 holding that although meals served employees for the convenience of their employers were not "wages" for withholding tax purposes, such meals would be regarded as "wages" for FICA and FUTA tax purposes.

Further Vacillation by the IRS. The treatment of employee meals was even further confused by the issuance in 1957 of Revenue Ruling 57-471, 1957-2 Cum. Bull. 630, which, in an unsuccessful attempt to reconcile S.S.T. 302, *supra*, and the applicable regulations, held that although meals served employees of a *bank* or *trust company* for the convenience of the employer would *not* constitute "wages" for FICA and FUTA purposes (see S.S.T. 302, *supra*), meals served employees of *food preparation establishments* (such as hotels, restaurants or cafeterias) for the convenience of their employers would constitute "wages" for FICA and FUTA tax purposes. Five years later, the Internal Revenue Service issued Revenue Ruling 62-150, 1962-1 Cum Bull. 213, which revoked S.S.T. 302, *supra*, stating, without explanation, the principle on which it now relies that, although the

convenience of the employer test continued to be applicable for income tax purposes, it was "no longer" a test for FICA and FUTA tax purposes. All of these changes in position by the Treasury occurred during a period in which there was no change by the Congress in the applicable statutes.

Limited Significance of Regulations §§31.3121(a)-1(f) and 31.3306(b)-1(f). The court below found that Regulations §§31.3121(a)-1(f) and 31.3306(b)-1(f), holding meals and lodging to be subject to FICA and FUTA tax, "were adopted pursuant to express statutory authority", implying that such regulations are "legislative" in nature (rather than merely interpretative) and should be given special weight by the courts. App. A, *infra*, 4a — 5a, 9a. However, the Government's authority to issue regulations is derived from Sections 808 and 908 of the Social Security Act which have now been incorporated in Section 7805 of the 1954 Code without any change in meaning or scope. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954). Section 7805 provides authorization for the issuance of "all needful rules and regulations for the enforcement of this Title" (i.e., Title 26, the entire Internal Revenue Code). The authority thus given to the Treasury Department by the Congress to issue regulations with respect to the Social Security taxes is no different, and no broader, than the interpretative regulation authority of the Treasury Department with respect to the Internal Revenue laws in general.

The court below says in its opinion:

> "We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike but in deciding to what extent Congress

> purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. *** Resolution of the issue does not turn on how we would, without further guidance, interpret the words, but on whether the construction reached by the Secretary is a permissible one." App. A, *infra*, 9a.

In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), this Court had before it a similar assertion that the Government had the ability to determine by regulation what was or was not "wages" for Social Security tax purposes. In refusing to accept the Government's attempt to define the word "wages" as having a meaning different from that ordinarily understood by such term, this Court observed that under the Social Security Act, contrary to the view of the Court below, the validity of regulations issued under the Act was specifically reserved for judicial determination. *Id.* at 368. Of specific relevance to the instant case is the following statement by this Court:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. . . . Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretative power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well understood word — 'wages'[17] — to indicate the receipts which were given to govern taxes and benefits under the Social Security Act." 327 U.S. at 369.

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[17] A word "intentionally narrow and precise." *Central Illinois, supra*, 435 U.S. at 31.

In determining whether back-pay awards were "wages" for computing benefits under the Social Security Act, this Court referred as authority to the definition of "wages" for *income tax* withholding. 327 U.S. at 366 (fn. 17).

In any event, the Government has changed its published positions on the treatment as FICA and FUTA "wages" of meals served for the convenience of the employer no less than *five* times, notwithstanding the absence of any change whatsoever in the applicable statutes.[18] The regulations and rulings interpreting the statute and regulations rulings are inconsistent and for that reason alone fail the test of "continuity without substantial change" regarded by this Court as essential in order that they be considered as having congressional approval and the effect of law. *United States* v. *Correll*, 389 U.S. 299, 305-06 (1967), cited by the court below, App. A, *infra*, 10a — 11a. Off and on for approximately 26 years, from the issuance in 1938 of S.S.T. 302, *supra*, until its revocation without explanation in Rev. Rul. 62-150, *supra*, the Government specifically recognized the convenience of the employer test as being applicable to a determination of FICA and FUTA wages. Against this background, the interpretation *now* put on the statute by the Government is entitled to no greater weight than the position of any litigant.

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[18] Compare Regulations 90, Article 207 (1936) (meals for the convenience of the employer not treated as wages); S.S.T. 110, 1937-1 Cum. Bull. 440 (same); S.S.T. 192, 1937-2 Cum. Bull. 449 (such meals treated as wages); S.S.T. 302, 1938-1 Cum. Bull. 456 (such meals not treated as wages); Regulations 106, §402.227, and Regulations 107, §403.227 (1940) (such meals "ordinarily" treated as wages); Mim. 5657, 1944 Cum. Bull. 630 (such meals served bank employees not treated as wages, such meals served other employees treated as wages); and Rev. Rul. 62-150, 1962 Cum. Bull. 213 (meals generally treated as wages).

Moreover, as recently noted by this Court in *National Muffler Dealers Association* v. *United States*, 440 U.S. 472 at 488 (1979), judicial acceptance of a regulation or the commissioner's interpretation of it is dependent upon a showing that it " 'implement[s] the congressional mandate in some reasonable manner' . . .". This the current regulation fails to do.

The court below says that:

> "*Absent some indication of a different congressional intention*, it does not appear inconsistent with the purposes of FICA and FUTA to consider meals and lodging of appreciable value remuneration whether or not they are furnished for the employer's benefit and are not considered to be compensation to the employee for income tax purposes." App. A, *infra*, 5a — 6a. (Emphasis added.)

But here there is a strong indication of congressional intention that "wages" be construed identically, rather than differently for all employment tax purposes. See pp. 13 — 15, *supra*.

When income tax withholding first came in, it was stated that the tax base — "wages" — was intentionally the same as that of the FICA and FUTA tax in order to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra* (1942), at 171.

The court below says that:

> "Ease of administration and uniformity of interpretation, even if not icons, merit consideration. Yet most businesses *today* utilize computers to calculate taxes and it is a simple matter to devise a program that includes some items for one or two taxes and excludes the same items in calculating others." App. A, *infra*, 11a. (Emphasis added.)

This Court should take judicial notice of the fact that in the taxable years here involved — 1967, 1968, and 1969 -- far fewer employers had computers to calculate taxes than *today*, and many still do not. But, more important, there were no computers for calculating taxes in 1942 when Congress deliberately chose the same word "wages" as the base for all employment taxes; whether Congress would have made the same decision today is irrelevant in light of the fact that it has never seen fit to overturn that decision, and its intent in enacting the statute should be given primary weight in applying the statute.

It should also be observed that great difficulty will often be encountered in determining the value of meals and lodging, placing an extremely heavy burden on the employer if it is to be fair to its employees in determining the amounts on which the employee FICA tax must be withheld and the employer FICA and FUTA taxes paid. Again, in describing income tax withholding, the Conference Report in 1943 said in referring to the bill which Congress adopted:

> "The methods of collection, payment, and administration of the withholding tax were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system." H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943), at 28.[19]

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[19] In *Harris Trust & Savings Bank* v. *United States*, now pending in the Court of Claims (Docket 105-79T), the Government contends that, even though the employer charged for meals in its company cafeteria, FICA and FUTA tax are due on a purported excess in value of the meals over the charges. The difficulty of determining

Furthermore, even if a regulation interpreting "wages" were to be given some particular weight, the Court of Claims has found that "as a guide to employers in their relations with employees, the existing regulation is nearly worthless." 597 F.2d at 1354. This Court pointed out in *Central Illinois* that

> "Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative." 435 U.S. at 31.

The Court of Claims in *Conquistador* found that

> "[The regulation prescribes that] as regards food and lodging furnished without charge, they are not 'wages' unless they are 'renumeration,' and the regulation admits that not all food and lodging benefits are 'remuneration.' Only 'ordinarily' and 'generally' they are. . . . The employer who concludes subjectively that his free meals are not 'remuneration,' will not find anything in the regulation to tell him whether he is right or wrong on the particular facts of his case. . . . The employer has no way of telling whether or not his plan is the ordinary or general case, except language that seems to intimate the regulator is thinking of rather massive benefits. . . . The concluding part of the quoted regulation would tell him to compare the food or lodging benefits with the 'total remuneration,' but he is not told what ratio will trigger a classification one way or the other; *i.e.*, what part the regulator deems an 'appreciable' part." 597 F.2d at 1353-54.

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such excess in withholding FICA tax from particular employees when some employees eat entirely different items and entirely different quantities than other employees, some bring their own lunches, and some eat differently some days than others, would be enormous.

The uncertainty engendered by such language has been intensified by the fact that the Government has changed its published position on the subjectibility of meals served for the convenience of the employer to FICA and FUTA taxes no less than five times, notwithstanding the absence of any change since 1940 in the applicable regulation. The court below was clearly in error in relying on the 1940 regulations, particularly in light of repeated narrower interpretation by the courts and the Internal Revenue Service of the word "wages" in the income tax and income tax withholding areas and the enunciation of a clear Congressional intent that the rules be the same for all employment tax purposes.

Other FICA and FUTA Regulations in Point: §§31.3121(a)-1(h) and 31.3306(b)-1(h). There is another reason why the court below reached the wrong conclusion in this case. It overlooked other FICA and FUTA regulations which provide:

> "Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide working and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages." FICA Regulation §§31.3121(a)-1(h). FUTA Regulation §31.3306(b)-1(h).

The income tax withholding regulation is identical (§31.3401(a)-1(b)(2)).

In Revenue Ruling 76-71, 1976-1 Cum. Bull. 308 at 310, the Service has said that expenses incurred directly by an employer which, if paid by his employees would be deductible by such employees as ordinary and necessary travel expenses, "are not 'wages' for purposes of Federal employment taxes," specifically including

FICA, FUTA and income tax withholding. Under Section 162(a)(2) of the Internal Revenue Code a deduction is allowed for

> "[T]raveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in pursuit of a trade or business."

In justifying deductions under this section for expenses overnight, this Court has pointed out that "the statute speaks of 'meals and lodging' as a unit," and that an employee gains only limited benefit from such expenses if he must also maintain a home for his family at his own expense even when he is absent on business." *United States* v. *Correll*, 389 U.S. 299 at 304-05. The principle of allowing a deduction (or exclusion if the expense is paid directly by the employer) is particularly applicable here where as a matter of practical necessity, an employee working offshore, cannot return home at night until his 10-day tour ends, but must nevertheless in the meantime, maintain living quarters on shore available for use between tours. See, in this connection, Revenue Rulings 54-497, 1954-2 Cum. Bull. 75; 75-432, 1975-2 Cum. Bull. 60, and 75-168, 1975-1 Cum. Bull. 58, applying such principle to railroad employees eating and sleeping aboard trains and truck drivers on long-haul overnight trips. Thus, the meals and lodging furnished Rowan's offshore employees are excluded from "wages" for FICA and FUTA tax purposes by Regulations §31.3121(a)-1(h) and §31.3306(b)-1(h) and Revenue Ruling 76-71, *supra*, — regardless of what the regulations relied on by the court below might seem to say.

II. Resolution Of The Conflict Is Of Importance To Both The Government And Thousands Of Taxpayers.

We are advised by the Government that there are currently several hundred cases pending at administrative levels or in the courts in which the Government is contending that meals and lodging admittedly not subject to income tax withholding because furnished for the convenience of the employer, are nevertheless subject to FICA and FUTA tax. The Government has indicated in Revenue Ruling 80-41, 1980-7 I.R.B. 14, that, despite such cases as *Conquistador*, it will continue to insist that employers withhold and pay such tax — presumably until the matter is resolved by this Court.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ROWAN COMPANIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 77-3044

United States Court of Appeals
Fifth Circuit.

Aug. 22, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and SMITH* District Judge.

ALVIN B. RUBIN, Circuit Judge:

The Federal Insurance Contributions Act (FICA) and the Federal Unemployment Act (FUTA) both use the simple word "wages" to designate the base for the taxes imposed. The taxpayer contends that the Secretary of the Treasury may not by regulation define that word to include the value of meals and lodging furnished in kind by an employer for his own benefit to employees away from home overnight. The fact that the regulation has been in force for forty years, the purpose of the statutes and the method of their administration convince us that the Secretary has not exceeded his authority. We, therefore, affirm the district court's summary judgment for the government.

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* District Judge of the Northern District of Mississippi, sitting by designation.

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I.

Rowan contracts with other firms to drill oil and gas wells both on land and beneath the offshore waters. When drilling offshore, Rowan moves its rig to the owner's location, as much as sixty miles from land. Each rig is operated by a drilling crew. Crews vary in size depending on the type of rig and may include from four to twelve persons. Each off-shore rig operates twenty-four hours a day, manned by two crews, each working twelve hours. Members of each crew remain offshore for a fixed period, known as a tour of duty, usually ten days, when they are provided transportation to shore and a period of leave, usually five days. When their new tour is to commence, Rowan provides transportation to the offshore location.

Because of the cost of transporting crews to and from land at the start and end of each shift, Rowan hires caterers to provide meals and maintain living quarters for crews working offshore. Eating facilities, sleeping quarters and lounge areas used for leisure activities while a crew is off duty are usually located on a vessel moored alongside the drilling platform.

The decision to afford these services was reached unilaterally by Rowan for its own economic reasons without either individual or collective bargaining.[1] Identical meals and facilities are provided to all employees regardless of their status or rate of pay. An employee who for any reason does not elect to eat meals furnished does not receive an allowance in lieu of them.

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[1] In the district court the IRS contended both that Rowan furnished these services under an implied contract and that the value of the services constituted wages as a matter of law, even in the absence of such a contract. Because the implied contract issue was disputed, the IRS contended summary judgment for Rowan was inappropriate. Before us the government no longer argues that there was an implied contract but urges only that the value of the meals and lodging constitutes wages as a matter of law.

Rowan did not include the value of meals and lodging in computing an employee's income in order to determine either the amount to be reported as income earned by the employee on the W-2 form, the amount to be withheld from wages for income tax purposes or the base on which to calculate the amount to be paid by it for FUTA purposes and by it and the employee for FICA purposes.

The Internal Revenue Service added the fair market value of meals and lodging to the tax base for FICA and FUTA taxes and assessed a deficiency in employer taxes for 1967, 1968 and 1969. The taxes were not assessed on the value of transportation to and from work, which was also furnished by Rowan.Rowan paid the deficiency and sues for refund. The IRS concedes that these benefits are not income on which the employee must pay income tax, and that as a result of a 1978 Supreme Court decision, they are not the subject of withholding. The IRS likewise does not challenge Rowan's position that it furnished these services for its own convenience.

II.

The Federal Insurance Contributions Act, which was adopted in 1935[2] imposes upon employers and employees alike a tax based on "wages," I.R.C. §§ 3101, 3111, currently at a rate of 6.13% on all wages up to $25,900 annually. The proceeds of this tax are used to defray the cost of the social security program. The Federal Unemployment Tax Act, also adopted in 1935, imposes a tax on employers based on "wages" paid to employees, I.R.C. § 3301. The proceeds of this tax are used to defray the cost of the federal unemployment conpensation program. In 1943, Congress adopted the Current Tax Payment Act, requiring employers to withhold income taxes in an amount based on employees' "wages," I.R.C. § 3402.

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[2] While the Act has been amended a number of times, the basis for the tax imposed and the purpose of the excise tax has never been altered.

The term "'wages" is defined by both FICA, I.R.C. § 3121(a), and FUTA, I.R.C. § 3306(b), as meaning "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."[3] In enacting the social security taxes, Congress manifested its intent to impose the excise on a wide range of employer-furnished remuneration. The Committee Reports state that wages include compensation for services paid in any form, such as room or board. H.R.Rep. No. 615, 74th Cong., 1st Sess. 3, 1939—2 C.B. 600, 606; S.Rep. No. 628, 74th Cong., 1st Sess. 49, 1939—2 C.B. 611, 620).[4]

Beginning in 1937, the Secretary began issuing rulings interpreting each statute to include in wages meals and lodgings furnished specific types of employees.[5] In a more general

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[3] The definition of "wages" for withholding purposes is substantially identical. See I.R.C. §3401(a).

[4] This legislative history from 1935 was not included in the IRS Cumulative Bulletin until 1939.

[5] Immediately after the enactment of the Social Security Act in 1935, the Treasury promulgated Regulation 90, Article 207 (1936) (dealing with FICA), which provided, "The medium in which the remuneration is payable is . . . immaterial. It may be payable in cash or in something other than cash such as goods, lodging, food and clothing." Article 207 also excluded the value of the use of facilities such as cafeterias furnished by an employer for its convenience, as did Article 14 of Regulation 91 (dealing with FUTA), but neither dealt generally with the broader subject of meals and lodging.

In 1937 these regulations were interpreted to require a sorority house to pay FICA and FUTA taxes on the value of free meals and lodging furnished to college students who lived or worked at the sorority house, S.S.T. 96, 1937-1 C.B. 439, and the value of board and lodging furnished to student nurses was held to constitute wages for social security purposes, S.S.T. 149, 1937-1 C.B. 380. In 1938, the value of food and lodging furnished to employees of a sanitarium, located in a remote geographical area where the employees had to remain constantly on duty, was ruled social security "wages" under the Regulations. S.S.T. 321, 1938-2 C.B. 323. *See also* S.S.T. 386, 1940-1 C.B. 211 (declaring the value of

regulation promulgated in 1940, he excluded from wages facilities or privileges of relatively small value furnished employees by the employer but included meals or lodging furnished "for example, to restuarant or hotel employees, or to seamen or other employees aboard vessels since generally these items constitute an appreciable part of the total remuneration of such employees." No mention was made of the convenience of the employer. Treas.Reg. 106 § 402.227 (FICA); Treas.Reg. 107 § 403.227 (FUTA). This provision was carried substantially unchanged into the 1951 regulations, Treas.Reg. 128 § 408.226, and into the 1956 regulations issued pursuant to the 1954 Code, Treas.Reg. §§ 31.3121(a)—1(f), T.D. 6190, 1956—2 C.B. 605, 619 (FICA), Treas.Reg. §§ 31.3306(b)—1(f), T.D. 6199, 1956—2 C.B. 721, 740 (FUTA). The regulations issued in 1956 remain in effect today.

[1] These regulations were adopted pursuant to express statutory authority. *See* I.R.C. § 7805(a). If they are reasonable and consistent with the statutory authorization, they may not be overturned. *Thor Power Tool Co.* v. *Commissioner,* 439, U.S. 522, 533 n.11, 99 S.Ct. 773, 781 n.11, 58 L.Ed.2d 785, 796 n.11 (1979); *Anderson, Clayton & Co.* v. *United States,* 562 F.2d 972, 976 n.6 (5th Cir. 1977), *cert. denied,* 436 U.S. 944, 98 S.Ct. 2845, 56 L.Ed.2d 785 (1978); *Kramertown Co.* v. *Commissioner of Internal Revenue,* 488 F.2d 728, 730 (5th Cir. 1974).

Absent some indication of a different congressional intention, it does not appear inconsistent with the purposes of FICA and FUTA to consider meals and lodging of appreciable value remuneration whether or not they are furnish-

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food and lodging furnished to seamen aboard ships to be "wages" for social security purposes); S.S.T. 110, 1937-1 C.B. 440 (which treated "supper money" paid to an employee who worked overtime by his employer "for the convenience of the employer in having the overtime service of the employee" as not constituting "wages" for purposes of FICA and FUTA); S.S.T. 192, 1937-2 C.B. 449, providing that free lunches served employees constitute "wages" for FICA and FUTA purposes.

ed for the employer's benefit and are not considered to be compensation to the employee for income tax purposes. Thus, the validity of the regulations was upheld in *Pacific American Fisheries* v. *United States*, 138 F.2d 464 (9th Cir. 1943). In 1962 Rev.Rul. 62-150, 1962-2 C.B. 213, declared that all worktime free meals representing an appreciable part of the remuneration of the employees, regardless of the nature of the business or the convenience of the employer, were subject to FICA and FUTA taxes. This position that was upheld in *S.S. Kresge Co.* v. *United States*, 218 F.Supp. 240 (E.D.Mich., 1963), and *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967), although those cases rely in part on the existence of a *quid pro quo* nexus between the giving of free meals and the receipt of employee services as justification for treating the value of the meals as "wages." Their logic is not, however confined to that situation.

Doubt arises not from any provision of FICA or FUTA but from the interpretation given the term "wages" in another tax statute. In 1943, Congress adopted the pay-as-you-go tax plan, still substantially in force, the Current Tax Payment Act of 1943, 57 Stat. 126. That act required employers to withhold income tax from "wages". The statute not only used that term but defined it in words that are, for present purposes identical to those used in FICA and FUTA.[6] However, in the same year, the Secretary adopted regulations excluding from wages for withholding purposes "living quarters or meals . . . furnished to an employee for the convenience of the employer . . . ." Treas.Reg. 115, §404.101. Thus, under the regulations, the criterion of taxability of meals and lodging under FICA and FUTA was whether the benefits amounted to an appreciable part of wages while the test for withholding was whether they were furnished for the employer's convenience, however large the value.

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[6] "[A]ll remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." I.R.C. §1621(a).

This conflicting interpretation of the same word used in three statutes and defined by indistinguishable definitional phrases was confirmed without explanation in Rev.Rul. 1944-7-11685, Mim. 5357, 1944 C.B. 550. Yet a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments.

Section 213 of the Revenue Act of 1918, 40 Stat. 1057, 1063, defined income as including "salaries, wages or compensation for personal service[s] . . . of whatever kind and in whatever form paid." The convenience of the employer doctrine arose in 1919, when the Treasury recognized that board and lodging furnished seamen in addition to their cash compensation is supplied for the convenience of their employer and that its value is not a part of the employee's income. O.D. 265, 1 C.B. 71. The convenience of the employer principle has been followed consistently in determining taxable income. *See* O.D. 514, 2 C.B. 90 (1920) (supper money furnished for extra work after hours is considered paid for the employer's convenience and is not taxable income); O.D. 814, 4 C.B. 84 (1921) (lodging and sustenance furnished employees engaged in fishing and canning); Treas.Reg. 111 §29.22(a)-3 (1939 Code). In 1954, Congress codified a major part of this interpretation of the income tax statute, limiting, however, the exclusion from gross income[3] to meals furnished on the employer's business premises and lodging that the employee is required to accept as a condition of his employment.[4] 26 U.S.C. 119.

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[3] The 1954 income tax statute defines income in extremely broad terms, imposing a tax on "income from whatever source derived . . . including wages, or compensation for personal service . . . of whatever kind and in whatever form paid." I.R.C. §61. It does not limit taxability to wages. *See Commissioner* v. *Kowalski*, 434 U.S. 77, 82-83, 98 S.Ct. 315, 319, 54 L.Ed.2d 252, 259 (1977).

[4] The amendment did not resolve the question of the taxability of other employer-furnished fringe benefits. In *Commissioner* v.

When the convenience of the employer exception for income tax purposes was codified, the Commissioner contemporaneously reiterated that this exception has no effect on the inclusion of the value of such benefits in the social security base. Rev.Rul. 54-593, 1954-2 C.B. 30, 31; accord, Rev.Rul. 71-411, 1971-2 C.B. 103, 105; Rev.Rul. 72-385, 1972-2 C.B. 535,538; Rev.Rul. 77-80, 1977-1 C.B. 36, 37 (value of free lodging furnished to religious leaders includable in the social security base even though exempt from income withholding taxes by reason of the section 119 "convenience of the employer" rules.)

The inconsistent definition of wages for withholding purposes, however, led to the argument that the more limited interpretation given the term used in the Current Tax Payments Act itself qualified the earlier definition used for FICA and FUTA. Thus, in *Royster Co.* v. *United States*, 479, F.2d 387 (4th Cir. 1973), the Fourth Circuit considered whether cash reimbursements to salesmen for the cost of their meals constituted wages for FICA and FUTA. Reasoning that these were not wages for withholding and that the term wages "has the same essential meaning," 479 F.2d at 390, in the withholding, FICA and FUTA tax statutes, the court held that they are not subject to the social security taxes. Similarly, the Seventh Circuit recently held that the difference between the cost to the employer of cars provided to employees for personal use and the amount the employees reimbursed the employer for that use was not wages, relying heavily on Royster.[9] *Oscar Mayer & Co.* v. *United States*, _____ F.2d _____, No. 79-1743 (7th Cir. June 20, 1980).

Kowalski, 434 U.S. 77, 98 S.Ct. 315, 54 L.Ed. 252 (1978), the court held that cash reimbursements to employees for meals consumed while on patrol duty constitutes income to the employees under section 61 and is not excludable under section 119. This still leaves some questions unresolved. *See* Resnik, *Meal Reimbusements as an Employee Fringe Benefit*, 10 Loy.L.Rev. 789 (1979).

[9] The court also relied on the absence of a "more specific" regulation clearly including the benefit within the definition of wages for FICA and FUTA purposes. Slip op. at 8726-8727, at _____.

The primary premise of these decisions appears to be semantic consistency. If so, it might with equal logic be argued that the Secretary's interpretation of wages under the withholding statute, coming as it did some years after the FICA and FUTA regulations, was the improper result. The inquiry is not, however, merely one of semantic comparison. The words, even if identical, are not components of an algebraic equation each side of which must inevitably yield the same result. We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike but in deciding to what extent Congress purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. This conclusion must be influenced by the purposes of the statutes, the uses made of their revenues and their relationship with other statutes. Resolution of the issue does not turn on how we would, without further guidance, interpret the words, but on whether the construction reached by the Secretary is a permissible one.

Federal income taxes are used for general expenditures. Withholding is a means to collect income taxes. FICA and FUTA taxes are collected for special purposes. They are not general revenue measures. The revenues are spent primarily to benefit the employees affected. The employer's obligation to withhold and pay FICA taxes and to pay FUTA taxes is primary whereas its obligation under the income tax provisions is secondary. If income tax is not withheld, the tax is still a debt of the wage-earner. If FICA or FUTA are interpreted to exclude an item, no revenue is produced.

These factors must be taken into account in weighing the applicability of the 1978 Supreme Court decision that an employer is not required to withhold taxes from cash reimbursement paid to employees for noon lunches while the employees are away from normal duty stations or on overnight trips. *Central Illinois Public Service Company* v. *United States,* 435 U.S. 21, 98 S.Ct. 917, 55 L.Ed. 2d 82 (1978). Rejecting the argument that, because the sums paid were taxable income, withholding was appropriate, the Court distinguished

between the broad definition of income in the income tax statute and the constrasting confinement of withholding to "wages" defined as "all remuneration (other than fees paid a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." I.R.C. § 3401(a). The government argued that the reimbursements were part of the "total package of remuneration designed to attract and hold the employee to the company." 435 U.S. at 28, 98 S.Ct. at 921, 55 L.Ed. at 89. The Court labelled this conclusion "facile." Noting that the regulation excluded benefits afforded employees away from home overnight, it refused to countenance the inclusion of other meals in wages. *Cf. United States* v. *Correll*, 389, U.S. 299, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967) (restricting to overnight trips the travel expense deduction for meal costs under I.R.C. §162(a)(2)). The Court concluded that the simplicity and ease of administration were the standards adopted by Congress in enacting withholding in 1942 and that these objectives had not since been changed. The Court thought it important that, absent further specific congressional action, the employer's obligation "be precise and not speculative." 435 U.S. at 31. 98 S.Ct. at 923, 55 L.Ed.2d at 91. Furthermore, because the Court was faced only with an attempt to apply retroactively a ruling imposing a tax on payments previously made, it did not decide the validity of regulation operating prospectively, as are these before us. See 435 U.S. at 32 n.12, 98 S.Ct. at 923 n.12, 55 L.Ed. at 91 n.12, and concurring opinion of Mr. Justice Brennan, joined by The Chief Justice and Mr. Justice Powell, 435 U.S. at 33-38, 98 S.Ct. at 923-26, 55 L.Ed. at 91-94.

The factors considered in *Central Illinois Public Service* apply here as well. Yet they do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations,[10] is invalid. "Treasury

---

[10] At least some members of Congress are aware of these regulations. *See* 124 Cong.Rec. S. 12367 (Daily ed. Aug. 2, 1978) (remarks of Sen. Long).

regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *United States* v. *Correll*, 389, U.S. 299, 305-306, 88 S.Ct. 445, 449, 19 L.Ed.2d 537, 543 (1967) (citing prior Supreme Court cases). Ease of administration and uniformity of interpretation, even if not icons, merit consideration. Yet most businesses today utilize computers to calculate taxes and it is a simple matter to devise a program that includes some items for one or two taxes and excludes the same items in calculating others.

(2) Considering these facts and the purposes served by FICA and FUTA, the latitude given the Secretary of the Treasury, and the difference in purpose between FICA and FUTA, on the one hand, and withholding and income taxes on the other, we are unable to agree with the rationale adopted by the Court of Claims in *Hotel Conquistador, Inc.* v. *United States,* 597 R.2d 1348 (Ct.Cl.1979), cert.denied, _____ U.S. _____, 100 S.Ct. 702, 62 L.Ed.2d 668 (1980), in holding that cafeteria meals furnished employees not away from home overnight were "not 'remuneration', therefore, not 'wages' " for FICA and FUTA. 597 F.2d at 1350.

The regulations before us are not without reason. The only appellate decisions restricting their scope are *Royster*, decided in 1973, *Hotel Conquistador*, decided in 1978, and *Oscar Mayer*, decided in 1980. While we are not unaffected by the pragmatic approach they represent, we believe that each proceeds largely on the thesis that the same words used in different statutes must mean the same thing and that, therefore, Congress intended to deny interpretative power to the Secretary. We are unable to subscribe to that conclusion.

Therefore, the judgment of the district court sustaining the validity of the FICA and FUTA regulations is AFFIRMED.[11]

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[11] In Revenue Ruling 80-41, I.R.B. 1980-7, 14 (Feb. 19, 1980), the Internal Revenue Service stated:

> ISSUE
>
> In *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1980 (Ct.Cl.1979), *cert. denied*, January 14, 1980, the Court of Claims held that the value of certain meals furnished without charge to hotel and restaurant employees was not "wages" under sections 3121(a) and 3306(b) of the Internal Revenue Code.
>
> It is the long standing position of the Service that the value of meals furnished without charge, for example to hotel or restaurant employees, or to seamen or other employees aboard vessels, is wages under sections 3121(a) and 3306(b) of the Code. This position has been supported by the courts in *S. S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967), concerning free meals furnished to lunch stand employees, and *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (9th Cir. 1943), concerning the value of board and lodging furnished to salmon packing plant employees.
>
> For these reasons, the Service will not follow the decision of the United States Court of Claims in the *Hotel Conquistador* case, and employers must continue to treat the value of such free meals furnished to their employees as wages under sections 3121(a) and 3306(b) of the Code.

In a letter to this court, the IRS seeks to buttress its position on the thesis that the Social Security Administration is mandated by 42 U.S.C. §409 and §404.1026(a)(6) of the Social Security Regulations on Federal Old-Age Survivors and Disability Insurance, 20 C.F.R. §404.1026(a)(6) (1979), to compute social security benefits on a base that includes the value of employer furnished meals.

While in this case we came to the result favored by the IRS, we cannot do so on this basis for it is an evident non-sequitur: 42 U.S.C. §409 (the Social Security Act) defines wages as "remuneration." If meals and lodging provided by Rowan are not remuneration for computing FICA tax, they are equally not remuneration for computing social security benefits. If the one is an incorrect definition, so is the other. An error is not cancelled by being twice repeated.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ROWAN COMPANIES, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 75-H-1818

Filed August 9, 1977

ORDER GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

The cross motion of the defendant, United States of America, for summary judgment pursuant to Rule 56(c) of the Rules of Civil Procedure, having been presented, and the Court being fully advised,

The Court finds that the defendant, is entitled to a summary judgment as a matter of law.

It is, therefore, ORDERED, ADJUDGED, and DECREED by the Court that plaintiff shall recover nothing herein, that the complaint be dismissed with prejudice and that defendant recover its costs.

Dated July 27, 1977.

/s/ Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
United States District Judge

APPENDIX C

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.) (1971):

SECTION 3101. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

* * *

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

* * *

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement* — The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. . . .

* * *

SECTION 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

* * *

SECTION 3121. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

* * *

SECTION 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

* * *

SECTION 3306. DEFINITIONS.

(b) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

* * *

SECTION 3401. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee

for his employer, including the cash value of all remuneration paid in any medium other than cash; . . .

* * *

SECTION 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding* — Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. . . .

* * *

Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.) (1971):

§31.3121(a)-1 *Wages.*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * *

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by

specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * *

§31.3306(b)-1 *Wages.*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * *

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * *

§31.3401(a)-1 *Wages.*

(b) *Certain specific items* —

(2) *Traveling and other expenses.* Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and

necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * *

(9) *Value of meals and lodging* — The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See §1.119-1 of this chapter (Income Tax Regulations).

* * *

No. 80-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Dist./Office—541 4

Docket: Yr.—75 Number—1818

Filing Date: Mo.—10 Day—23 Year—75

J—2 N/S—870 O—1

Demand: $—30

Judge Number—4109

ROWAN COMPANIES, INC., *Plaintiffs*

v.

UNITED STATES OF AMERICA, *Defendants*

Jury Requested by Plt.—10/24/75

CAUSE—28 USC 1346, Suit for Tax Refund—$30,615.81

Attorneys: ELMER H. THEIS, 601 Jefferson, Suite 730
Houston, Texas 77002 654-8989

AUSA—ROBERT DARDEN, LOUISE PARKS, atty-in-charge
Dallas Field Office, Dept. of Justice, Tax Div.
Room 8B37, 1100 Commerce St., Dallas Tx. 75202
214-749-1251

FILING FEES PAID

Date—10/23/75 Receipt Number #5687 $15.00

Date—9/21/77 Receipt Number #21937 $5.00 N.A.

75-H-1818 ROBERT O'CONOR, JR.

PROCEEDINGS

Date Nr.

10/23/75—1—Complaint filed. (2) summons issued.

11/11/75—2—Return of summons on District Director, IRS by mail delivered 10/28.

11/11/75—3—Return of summons on USA on 10/24/75 by personal service on Admin. Secy. and on AG by mail delivered on 10/24/75, fld.

12/23/75—4—ANSWER, filed.

12/29/75—5—ENTRY OF APPEARANCE, filed.

1/23/76—6—Return of summons on Lionel Powell served 11/12/75, filed.

1/23/76—7—Return of summons on Lionel Powell for Dynamic Motel served 11/12/76, filed.

3/4/76—8—Deft INTERROGATORIES to Pltf, filed.

3/24/76—9—Plf MOTION FOR ENLARGEMENT OF TIME to answer interrogs, fld.

3/24/76—10—(WS) ORDER granting motion for enlargement of time to answer Interrogatories to May 5, 1976, fld a/n

5/12/76—11—Deft's RESPONSE TO REQUEST FOR ADMISSIONS, fld.

5/12/76—12—Deft's ANSWERS to Pltf's INTERROGATORIES, fld.

5/12/76—13—AFFIDAVIT of Joe W. Burkett as atty-in-chg for Deft, fld.

5/19/76—14—Deft's RESPONSE AND OBJECTIONS to Pltf's REQUEST FOR PRODUCTION OF DOCUMENTS, fld.

6/3/76—(RGG)—AMENDED DIVISION OF BUSINESS ORDER, dated 5/29/76, case transferred to ROSS N. STEBLING

7/9/76—15—(NWB) DOCKET CONTROL ORDER, filed; cut off dates as follows:

New parties 8/1/76
Discovery 10/15/76
Motions 10/15/76
PTO 10/18/76
DOCKET CALL Jan. 3, 1977, 11:00 ETT 1 da

7/15/76—16—Response of Plaintiff to Defendant's Interrogatories, filed.

7/15/76—17—Plaintiff's Request for Admission, filed.

7/15/76—18—Plaintiff's Request for Production of Documents, filed.

8/6/76—19—Pltf's Motion to Compel Production of Documents, filed.

8/6/76—20—Pltf's Notice, filed. M/D 8/30/76 set by Clerk

?/30/76—21—Deft's Opposition to Pltf's Motion To Compel Production of Documents, filed.

10/26/76—Pursuant to Local Rule 9B, this case is transferred to Judge Robert O'Conor, Jr. All Parties Notified.

1/25/77—22—(RO) Order, Setting the Case for Jury Trial on April 11, 1977 & discovery cut off date is April 1, 1977, filed. P/N

2/8/77—23—(RO) Order, granting Pltf's Motion to compel production of documents, filed. P/N

2/8/77—24—Notice of Entry of Order granting Pltf's Motion to compel production of documents, filed. P/N

3/24/77—25—Deposition of C. W. Yeargain, filed.

3/24/77—26—Deposition of J. C. Magner, filed.

3/24/77—27—Pltf's Motion for Summary Judgment, filed. M/D 4/25/77 per atty-????

3/24/77—28—Pltf's Memorandum in Support of Motion for Summary Judgment, filed.

4/22/77—29—Deft's Opposition to Pltf's Motion for Summary Judgment and Cross Motion for Summary Judgment, filed. M/D 4/25/77 (Memorandum attached)

4/27/77—(RO) Phone Conference: Remove from setting of 5/16; Rule on Motion for S/J while in Houston.

4/29/77—30—Opposition & Memorandum in Opposition to Deft's Motion for Summary Judgment by Pltf, filed.

5/16/77—31—Memorandum in Reply to Pltf's Opposition to Deft's Motion for Summary Judgment, filed.

6/28/77—32—Entry of Appearance by Louise G. Parks for the U.S.A., filed.

8/9/77—33—(RO) Order, Granting Deft's Cross Motion for Summary Judgment, filed. P/N by copy

9/21/77—34—Pltf's Notice of Appeal from Order fld 8/9/77; fld.

9/21/77—35—Cost Bond on Appeal fld. (check)

10/28/77—Record on Appeal consisting of all original papers & (2 vol) depositions fwd to Ct of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil No. 75-H-1818

ROWAN COMPANIES, INC., *Plaintiff*,

vs

UNITED STATES OF AMERICA, *Defendant*.

COMPLAINT

Filed Oct. 23, 1975

1. This action arises under the Internal Revenue laws of the United States, and this Court has jurisdiction by virtue of 28 U.S.C. § 1346(a)(1).

2. The Plaintiff is a corporation organized and existing under the laws of the State of Delaware, with a permit to do business in Texas and with its principal office and place of business in the City of Houston, Texas. All taxes and interest paid by Plaintiff, as hereinafter set forth, were paid to the Director, Internal Revenue Service, United States Treasury Department, Dallas, Texas.

3. Within the period prescribed by law, Plaintiff filed the appropriate federal returns for the first through fourth quarters of 1967, 1968 and 1969, respectively, indicating for the said periods the amount of federal income taxes withheld from wages and the amounts of taxes on account of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA).

4. On October 31, 1972, the District Director of Internal Revenue, Austin, Texas, notified the Plaintiff that he proposed within thirty days to assess the Plaintiff a deficiency of the aforesaid FICA and FUTA taxes, only, in accordance with the report transmitted therewith.

5. On November 16, 1973, Plaintiff paid to the aforesaid District Director of Internal Revenue at Dallas, Texas, the

sum of $31,246.74, consisting of additional FICA taxes and interest accrued thereon.

6. On November 20, 1973, Plaintiff paid to the aforesaid District Director of Internal Revenue at Dallas, Texas, the sum of $4,583.59, consisting of additional FUTA taxes and interest accrued thereon.

7. On April 1, 1975, Plaintiff filed with the District Director, Internal Revenue Service Center, Southwest Region, at Austin, Texas, on Form 843, Claims for Refund of Additional Taxes Paid, in the total amount of $35,198.46, representing the total amount of the overpayment of said FICA and FUTA taxes and accrued interest as above stated. More than six months has elapsed since filing of said claims without action by the said District Director, Austin, Texas.

8. More than six months have passed since the filing of said claims by the Plaintiff, and the appropriate official of the Internal Revenue Service has neither allowed nor denied the said claims. This suit is timely filed, and all procedural requisites have been complied with by the Plaintiff.

9. The claim for additional taxes by the Internal Revenue Service arose from the fact that Plaintiff did not withhold and/or pay FICA and FUTA taxes on the meals and lodgings furnished certain employees of the Plaintiff.

10. Plaintiff is engaged in the business of drilling oil and gas wells for various oil companies at contractually stipulated prices or rates, and, as such, does not participate in the economic benefits or suffer losses from wells drilled by reason of any oil or gas produced from such wells or on account of failure to find oil or gas. The Plaintiff engages in said business in the domestic land and offshore areas, as well as overseas, and in connection therewith uses its well drilling machinery (drilling rigs), which are mobile and itinerate in nature and move to various places as drilling jobs are obtained for same by Plain-

tiff. Historically, Plaintiff's drilling rig employees have been furnished free meals and lodging, without paying for the same in cash or otherwise, while working in offshore and certain other areas.

11. The meals and lodgings furnished to drilling rig employees, as aforesaid, do not constitute wages, as defined in IRC § 3401(a) in regard to withholding income tax; IRC § 3121(a) in regard to FICA taxes; and IRC § 3306 (b) in regard to FUTA taxes and valid regulations promulgated thereunder.

12. The said District Director elected not to assess or propose to assess a tax deficiency for failure to withhold federal income taxes under Internal Revenue Code § 3402 (a) on the same meals and lodgings with reference to the same employees regarding which he did elect to assess or propose to assess a tax deficiency as above set forth although the definitions of "wages" under Internal Revenue Code §3121(a) [FICA], Internal Revenue Code § 3306(b) [FUTA] and Internal Revenue Code § 3401 [federal income tax withholding] have the same essential meaning.

13. The taxes and interest aforesaid were erroneously assessed and unlawfully collected. Plaintiff, therefore is entitled to a refund of all taxes and interest paid, together with interest on such amounts from the date thereof.

WHEREFORE, Plaintiff prays for judgment against the United States of America in the amount of $30,615.81, together with interest thereon from November 16, 1973, and in the amount of $4,582.65, together with interest thereon from November 27, 1973, and costs according to law.

/s/ ELMER H. THEIS
Elmer H. Theis
Attorney for the Plaintiff

Elmer H. Theis
5100 Westheimer—Suite 200
Houston, Texas 77027

JURY DEMAND

Plaintiff, Rowan Companies, Inc., in accordance with 38(b) of the Federal Rules of Civil Procedure hereby makes its demand for a trial by jury of any issue triable of right by jury.

/s/ ELMER H. THEIS
Elmer H. Theis
Attorney for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil No. 75-H-1818

ROWAN COMPANIES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

ANSWER

Filed Dec. 23, 1975

The defendant, United States of America, by its attorney, Edward B. McDonough, Jr., for the Southern District of Texas, answers plaintiff's complaint as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except is presently without information as to the exact amount of FICA taxes and interest paid.

6. Admits the allegations contained in paragraph 6, except is presently without information as to the exact amount of FUTA taxes and interest paid.

7. Denies there has been any overpayment of taxes or interest but admits the remaining allegations of paragraph 7.

8. Admits the allegations contained in paragraph 8.

9. Admits the allegations contained in paragraph 9.

10. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 10, except admits that plaintiff is engaged in the business of drilling oil and gas wells in the domestic land and offshore areas, as well as overseas, and in connection therewith uses its well drilling machinery (drilling rigs).

11. Denies the allegations contained in paragraph 11.

12. Denies the allegations contained in paragraph 12, and avers that action by the District Director and the pertinent Code sections speak for themselves.

13. Denies the allegations contained in paragraph 13.

WHEREFORE, the defendant prays for judgment in its favor, for its costs, and for such other and further relief as this Court may deem just and proper.

EDWARD B. McDONOUGH, JR.
United States Attorney

By: /s/ ROBERT DARDEN
Assistant United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Answer, has this 19th day of December, 1975, been made on counsel for plaintiff, by depositing a copy thereof, postage prepaid, in the United States mail addressed to Elmer H. Theis, Esquire, 5100 Westheimer, Suite 200, Houston, Texas 77027.

/s/ JOHN F. MURRAY
John F. Murray
Attorney, Tax Division
Department of Justice
Washington, D. C. 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil No. 75-H-1818

ROWAN COMPANIES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

DEFENDANT'S RESPONSE TO REQUEST FOR ADMISSIONS

Filed May 12, 1976

The defendant submits the following in response to plaintiff's request for admissions:

Request:

1. That each of the following statements are true:

(a) That the Director, Internal Revenue Service, Dallas, Texas, by notices dated November 19, 1973, assessed $4,583.59 in FUTA taxes, and interest to November 19, 1973, against the Plaintiff. Those assessments were as follows:

Calendar Year	Taxes Assessed	Interest Assessed	Amount Assessed
1967	$1,419.52	$ 494.17	$1,913.69
1968	1,101.08	317.25	1,418.33
1969	1,019.09	232.48	1,251.57

Response:

1(a) Admits.

Request:

(b) That the Director, Internal Revenue Service, Dallas, Texas, by notices dated November 12, 1973, assessed $31,246.74 in FICA taxes, and interest to November 12, 1973, against the Plaintiff. Those assessments were as follows:

Quarter	Taxes Assessed	Interest Assessed	Amount Assessed
First, 1967	$3,099.63	$1,215.48	$4,315.11
Second, 1967	1,760.72	654.94	2,415.66
Third, 1967	2,115.33	765.69	2,881.02
Fourth, 1967	2,266.22	786.31	3,052.53
First, 1968	2,638.83	876.45	3,515.28
Second, 1968	1,466.42	464.81	1,931.23
Third, 1968	1,217.97	367.79	1,585.76
Fourth, 1968	1,961.31	366.71	2,328.02
First, 1969	1,891.32	514.70	2,406.02
Second, 1969	1,710.06	439.44	2,149.50
Third, 1969	1,533.42	371.04	1,904.46
Fourth, 1969	2,251.19	510.96	2,762.15

Response:

1(b) Admits.

Request:

(c) That on or about November 20, 1973, the Plaintiff paid the sum of $4,583.59 to the Internal Revenue Service as payment of the FUTA tax and interest assessment described in request 1(a) above.

Response:

1(c) Defendant qualifiedly admits request for admission No. 1(c) in that it admits plaintiff made payment of $4,583.59 with respect to FUTA taxes and assessed in-

terest for the calendar years 1967, 1968, and 1969, but avers that such payment was made on November 26, 1973.

Request:

(d) That on or about November 16, 1973, the Plaintiff paid the sum of $31,246.74 to the Internal Revenue Service as payment of the FICA tax and interest assessment described in 1(b) above.

Response:

1(d) Defendant qualifiedly admits the statement contained in request for admission No. 1(d) in that defendant admits that payment was made by plaintiff with respect to FICA taxes and assessed interest for all quarters of 1967, 1968, and 1969 in the total amount of $31,246.74, but avers that such payment was made on November 20, 1973.

Request:

(e) That on or about October 31, 1972, the District Director, Internal Revenue Service, Austin, Texas, informed the Plaintiff by letter and examination report enclosed therewith that the reason why an adjustment of Plaintiffs' tax liability was considered necessary is as follows:

"You failed to withhold social security taxes on the fair market value of meals and lodging furnished to your employees. SST386 CB-1940 1,211; Revenue Ruling 62-150 and Federal Unemployment Tax Act; Section 31.3306(b)-1(f) of the Employment Tax Regulations."

Response:

1(e) Defendant qualifiedly admits the statement contained in request for admission No. 1(e) in that it admits that on October 31, 1972, the District Director, Internal

Revenue Service, Austin, Texas, furnished plaintiff the "Examination Report" with respect to Employment Tax Audit Changes for Rowan Companies, Inc., for 1967, 1968, and 1969. Defendant also admits that a letter was sent in connection therewith and that, in addition, an instrument was furnished plaintiff that was designated "Summary of Employment Tax Audit." Defendant also admits that in the space captioned "Other Information," the statement was included:

> "You failed to withhold social security taxes on the fair market value of meals and lodgings furnished to your employees. SST 386 CB-1940 1, 211; Revenue Ruling 62-150 and Federal Unemployment Tax Act; Section 31.3306(b)-1(f) of the Employment Tax Regulations.

Defendant avers that the statutes, Regulations, rulings, and other case authorities which are controlling with respect to the taxes in dispute speak for themselves, and defendant otherwise denies the statement contained in request for admission No. 1(e).

Request:

> (f) That the reason for making the FUTA and FICA tax assessments in this action set out in the letter and examination report referred to above in request 1(e) was the only reason given to Plaintiff by Defendant on or prior to November 20, 1973, for making the said FUTA and FICA tax accrued interest assessments.

Objection and Response:

1(f) Defendant objects to the matters set forth in request for admission No. 1(f). Plaintiff has the burden of establishing that the assessment in question was erroneous. The statutes, Regulations, rulings, and case au-

thorities which are controlling with respect to the taxes in dispute speak for themselves. Therefore, defendant objects to the request for admission on grounds of relevance. Defendant also objects because the request seeks a legal conclusion and does not ask for an admission of fact. Subject to the above objections, defendant responds by averring that the statement to which reference is made in request for admission No. 1(e) was provided to plaintiff under the caption "Other Information" in the "Summary of Employment Tax Audit" with respect to the adjustments to employment taxes of Rowan Companies, Inc., for the years 1967, 1968, and 1969; but defendant, while having examined its files, does not presently have information sufficient to permit it to admit or deny whether any other matters were conveyed to the plaintiff with respect thereto. Subject to the above objection and the qualifications as stated, defendant otherwise denies the statements contained in request for admission No. 1.

Request:

> (g) With respect to salaries and wages paid by Plaintiff herein to its employees, Plaintiff withheld FICA and income withholding taxes during the calendar years 1967, 1968 and 1969; filed timely annual FUTA returns for 1967, 1968 and 1969, timely guarterly FICA returns during 1967, 1968 and 1969, and remitted the amounts due as to such salaries and wages paid to its employees.

Response:

(g) Defendant denies that plaintiff withheld FICA and FUTA taxes in the proper amounts with respect to the salaries and wages paid by plaintiff to its employees for 1967, 1968, and 1969, and denies that plaintiff remitted the proper FICA and FUTA taxes "due as to such salaries and wages paid to its employees." Defendant other-

wise admits the statements made in request for admission No. 1(g).

Request:

(h) Plaintiff engaged in the practice of furnishing meals and lodgings to certain of its employees, including the specific employees named in the examination report referred to in request 1(e) above, without cash payment for the same from such employees, which practice was in existence during the years 1967, 1968 and 1969.

Response:

1(h) Admits.

Request:

(i) Plaintiff did not withhold FICA or income withholding taxes for the fair market value of meals and lodgings furnished certain of its employees without cash payment therefor during the years 1967, 1968 and 1969, including those employees named in the examination report referred to in reqeust 1(e) above.

Response:

1(i) Admits.

Request:

(j) Upon audit, the appropriate official of the Internal Revenue Service assessed the amount of FUTA taxes and FICA taxes described in request 1(a) and 1(b), respectively, above, but no assessment was made by any official of Internal Revenue Service for income withholding taxes on the fair market value of meals and lodgings furnished by Plaintiff to its employees during the years 1967, 1968 and 1969, including those

employees named in the examination report referred to in request 1(e) above.

Response:

1(j) Admits.

Request:

(k) That Plaintiff's employees who received meals and lodgings from Plaintiff, without cash payment therefor, during the calendar years 1967, 1968 and 1969 performed no services in exchange for such meals and lodgings.

Response:

1(k) Denies.

Request:

(l) That Plaintiff's employees who received the meals and lodgings from Plaintiff which are involved in this action were not required by Plaintiff to interrupt their eating periods nor their resting periods in the lodging facilities provided by Plaintiff for the purpose of performing any services for Plaintiff.

Objection and Response:

1(l) Defendant objects to request for admission No. 1(l) on grounds of relevance. Subject to its objection, defendant responds by stating that defendant does not presently have sufficient information to permit it to admit or deny the statement contained in request for admission No. 1(l). Defendant has reviewed the files presently available to it and anticipates that additional discovery will be undertaken in this cause of action and that such discovery may provide defendant with sufficient information and

knowledge as to permit it to formulate a full and accurate response to the inquiry that has been made.

EDWARD B. MCDONOUGH, JR.
United States Attorney

By:
/s/ JOE W. BURKETT
Joe W. Burkett
Attorney, Tax Division
Department of Justice
Room 8B37, 1100 Commerce Street
Dallas, Texas 75242
(214) 749-1251

Attorney for Defendant

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing defendant's response to request for admissions has this 10th day of May 1976 been made on opposing counsel by mailing a copy thereof to Elmer Theis, Esquire, 5100 Westheimer, Suite 200, Houston, Texas 77027.

/s/ JOE W. BURKETT
Joe W. Burkett

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil No. 75-H-1818

ROWAN COMPANIES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

RESPONSE OF ROWAN COMPANIES, INC. TO DEFENDANT'S INTERROGATORIES

Filed July 15, 1976

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Rowan Companies, Inc., for its response to Defendant's interrogatories, states as follows:

[Each of Defendant's interrogatories is repeated below and is followed by the response of Rowan Companies, Inc., thereto.]

1. Please state your name, current business and residence addresses, and the title of each position which you hold with the Plaintiff.

Response: J. C. Magner, business address 1900 Post Oak Tower, 5051 Westheimer, Houston, Texas 77056, and home address 13303 Apple Tree, Houston, Texas 77024, a Senior Vice President of Rowan Companies, Inc.

2. Do you have actual knowledge of the facts and events surrounding the matters discussed in certain claims for refund filed April 1, 1975, by Plaintiff for all quarters of 1967, 1968, and 1969? If your answer to this interrogatory is in the affirmative, please state the title of all positions which you held with the plaintiff at the time of the occurrences reflected therein and a concise statement of the

nature and extent of your responsibilities and duties in connection with such occurrences.

Response: No.

3. If your answer to interrogatory No. 2 is in the negative, please state at the conclusion of your answers to each of the subsequent interrogatories the name and address of the person or persons with whom you consulted in order to obtain the information contained in your answer, a concise description of the documents consulted in order to answer the interrogatory, and a statement of any other source to which you turned in order to obtain the information necessary to answer the interrogatory.

Response: I cannot comply with the request contained in this interrogatory, for the reason that information used to answer all or parts of some of the interrogatories was acquired during the course of the Internal Revenue Service audit in this case and subsequent correspondence, conferences with attorneys, and intra-company discussions which eventually led to the payment of the assessment and filing claims for refund. This covers a period of several years, and my memory does not permit me to make definite statements under oath as to the various sources of the information just mentioned.

4. State in detail the nature of the business conducted by Plaintiff during the calendar years 1967, 1968, and 1969.

Response: During the calendar years 1967, 1968, and 1969, Plaintiff owned drilling rigs and engaged in the business of contract oil and gas well drilling.

5. State when Plaintiff was first incorporated, the state of incorporation, and the names of the original incorporators.

Response: Plaintiff was incorporated in Delaware in 1947 and the names of the original incorporators are: C. S. Peabbles, S. M. Brown and H. K. Webb.

6. State the names and last known addresses of all officials of the company during the period referred to in interrogatory No. 4, and give the position or positions, duties, and responsibilities of each.

Response: The names, last known addresses, positions and duties of all officials of Plaintiff during calendar years 1967, 1968, and 1969 are as follows:

Officer	Office	Last Known Address
A. H. Rowan (Died Jan. 1975)	Chairman of Board	1804 Commerce Bldg. Fort Worth, Texas
M. G. Rowe (Died Jan. 1972)	President Chairman of Board	5930 Green Tree Houston, Texas
Cecil Provine (Retired 5/31/73)	Executive Vice President President	5422 Candlewood Houston, Texas
J. C. Magner	Vice President (Legal-Contracts)	1900 Post Oak Tower Houston, Texas
M. L. Hart (Retired 5/1/69)	Vice President (Personnel)	5028 Bruce Avenue Fort Worth, Texas
C. W. Yancey (Retired 6/30/74)	Vice President	5747 Indian Circle Houston, Texas
Leroy Gideon (Resigned ——)	Vice President (Exploration & Production)	Route 2, Box 317-E Leander, Texas
Mrs. B. S. Brants (Retired 3/31/68)	Secretary-Treasurer	6228 Locke Fort Worth, Texas
D. C. Anderson	Ass't Secretary-Treasurer Secretary-Treasurer	1900 Post Oak Tower Houston, Texas
R. H. Huey (Resigned 6/30/72)	Vice President, Treasurer (Finance)	4444 Westheimer Houston, Texas
Fred Ryan	Controller (Hired 5/1/68)	1900 Post Oak Tower Houston, Texas
R. A. Watson	Vice President (Engineering, Production)	1900 Post Oak Tower Houston, Texas
Terry Wilson (Resigned 1/18/71)	Assistant Secretary	13723 Overbrook Houston, Texas

7. During each of the taxable years 1967, 1968, and 1969, state the names and last known addresses of all individuals who participated in the process of employing individuals to work on Plaintiff's drilling rigs, and state the position held by each and his or her responsibilities.

Response: To the best of my knowledge on the date hereof, the names and last known addresses of all individuals who participated in employing individuals to work on Plaintiff's drilling rigs, during taxable years 1967, 1968, and 1969 and the position and responsibilities of said individuals are as follows:

Name	Last Known Address	Position
C. W. Yancey	5747 Indian Circle Houston, Texas	Division Superintendent
D. E. McCary	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
J. M. Parks	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
E. M. Spellman	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
F. L. Webb	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
L. W. Douglas	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
C. L. McDonald	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
George McGlocklin	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent

Name	Last Known Address	Position
E. E. Jones	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
P. J. Boyd	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
D. L. Moody	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
L. A. Lynn	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
F. W. Bevills	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
C. E. Corley	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
D. D. Dotson	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
J. N. McCary	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
T. E. Jones	1900 Post Oak Tower 5051 Westheimer Houston, Texas 77056	Rig Superintendent
J. A. Cupp	Box 263 Boutte, Louisiana	Rig Superintendent
F. H. McLemore	5608 Bernard New Orleans, Louisiana	Rig Superintendent
A. J. Savoie, Jr.	R.R.D. Box 188 Q Franklin, Louisiana	Rig Superintendent
K. D. Sandidge	P.O. Box 983 Innis, Louisiana	Rig Superintendent
Roger F. Conger	116 Grand Island Belle Chasse, Louisiana	Rig Superintendent

8. With respect to each of the taxable years 1967, 1968, and 1969, state whether Plaintiff had any advertisement in any newspaper or periodical wherein Plaintiff sought to obtain the services of employees in connection with Plaintiff's drilling rigs.

Response: During taxable years 1967, 1968, and 1969, Plaintiff had no advertisements in any newspaper or periodical wherein Plaintiff sought to hire employees.

9. If the answer to interrogatory No. 8 is in the affirmative, state as to each such advertisement:

(a) The full name of the newspaper or periodical in which it appeared;

(b) the date of publication; and

(c) the page or section in which it appeared.

Response: See Response to Interrogatory 8.

10. Did the Plaintiff, during the years 1967, 1968, and 1969, use any public or private employment service for purposes of obtaining the services of individuals to work as employees on drilling rigs? If so, explain in detail such use of employment service, i.e., date, name of service, name of person hired, etc.

Response: During the years 1967, 1968, and 1969, Plaintiff did not use any public or private employment service for purposes of obtaining employees to work on Plaintiff's drilling rigs.

11. State the name and last known address of the individual in charge of personnel for Plaintiff during the years 1967, 1968, and 1969.

Response: Individuals in charge of personnel for Plaintiff during the years 1967, 1968, and 1969 were as follows:

John S. Jackson
1900 Post Oak Tower
5051 Westheimer
Houston, Texas 77056

Mark L. Hart
5028 Bryce Avenue
Fort Worth, Texas 76107

12. With respect to the taxable years 1967, 1968, and 1969, state whether there were in existence any written agreements between Plaintiff-corporation and any individuals working as employees on drilling rigs as to the remuneration to be paid them for their services thereon.

Response: Plaintiff had no such agreements.

13. If the answer to the preceding interrogatory is in the affirmative, state with sufficient detail as to uniquely identify each such instrument, and state the name of last known address of the custodian thereof. (In lieu of a description, a copy of each such instrument may be attached hereto.)

Response: See Response to Interrogatory 12.

14. During the taxpayer's period of 1967, 1968, and 1969, state the number of individuals that would generally be aboard a drilling rig at any one time for the performance of services in behalf of Plaintiff. Please state also the number of hours each such individual would perform services during the workday, and the number of individuals per shift.

Response: Depending on the type of drilling rig, there would generally be from 7 to 24 individuals aboard a rig

at any one time. Again, depending on the type of rig, there were approximately 7 to 12 individuals working per shift, from 8 to 12 hours per day.

15. With respect to each of the taxable years 1967, 1968, and 1969, please provide the following:

(a) The minimum salary paid an individual performing services on any of plaintiff's drilling rigs;

(b) the maximum salary paid any individual performing services on any of Plaintiff's drilling rigs;

(c) the average salary of all individuals performing services for Plaintiff on Plaintiff's drilling rigs; and

(d) the average salary of all individuals performing services for Plaintiff in a nonsupervisory capacity on Plaintiff's drilling rigs.

Response:

(a) $2.06 per hour

(b) $1,181.00 per month

(c) and (d) Plaintiff cannot answer parts of the Interrogatory without having a definition or formula to define "average," for the reason that there is more than one type drilling rig involved, different crew sizes, different pay scales and other similar differences.

16. With regard to an individual employed by Plaintiff to perform services on a drilling rig during the years 1967, 1968, and 1969, please state the following:

(a) The hours such individual would work each day;

(b) the number of days per week such individual would work;

(c) the number of days an individual would remain on the drilling rig; and

(d) the maximum number of days an individual was allowed to remain on the drilling rig.

Response:

(a) From 8 to 12 hours per day.

(b) From 6 to 7 days per week.

(c) From 8 hours to 7 days.

(d) From 8 hours to 7 days.

17. During the taxable years 1967, 1968, and 1969, state whether any of the meals provided employees on drilling rigs were prepared or made available by caterers or third-party concerns.

Response: Some meals on some drilling rigs were prepared or made available by caterers or third-party concerns.

18. If your answer to the preceding interrogatory is in the affirmative, please state the following:

(a) The name and addresses of each such caterer or third party;

(b) the dates during which such caterer or third party participated in providing meals for the employees on the drilling rigs; and

(c) the names of all individuals associated with each such caterer or third party who were in regular contact with Plaintiff with regard to billing Plaintiff for meals.

Response: Information to answer this interrogatory is not known to me, however, Universal Services, Inc., New Orleans, Louisiana, probably is one of the caterers.

19. During the taxable years 1967, 1968, and 1969, state whether meat, produce, or other foodstuffs were delivered to Plaintiff's drilling rigs by any third-party concerns.

Response: Meat, produce, or other foodstuffs were delivered to some of Plaintiff's drilling rigs by third-party concerns.

20. If your answer to the preceding interrogatory is in the affirmative, please state the following:

(a) The name and address of each such third-party concern;

(b) the dates during which each such third-party concern participated in delivering meats, produce, or other foodstuffs to Plaintiff's drilling rigs;

(c) the names of all individuals associated with each such third-party concern who had contact with Plaintiff with regard to billing Plaintiff for the delivery of meat, produce, or other foodstuffs to Plaintiff's drilling rigs.

Response: The transportation of the food items inquired about in Interrogatory 19 was furnished and/or arranged for by the caterer serving the particular drilling rig involved by dealing directly with third parties. The details inquired about are outside of my knowledge.

21. If your answer to interrogatory No. 19 is in the affirmative, state the method by which it was determined how much Plaintiff was to pay for the delivery of meat, produce, or other foodstuffs to each of the Plaintiff's drilling rigs.

Response: Price paid for delivery of meat, produce and other foodstuffs to certain of Plaintiff's drilling rigs was included in lump sum catering cost per day.

22. If your answer to interrogatory No. 19 is in the affirmative, give the names and present or last known addresses of all individuals associated with either Plaintiff or third-party concerns who participated in the determination of how much was to be paid, and state his or her position with Plaintiff or the third-party concern.

Response: See Response to Interrogatory 21.

23. Please state all means of transportation which were routinely used by employees during the years in question to get to and from drilling rigs.

Response: During the years in question, employees utilized motor vehicles, boats and helicopters, as appropriate, and possibly other means not known to Affiant to get to and from drilling rigs.

24. Please state the number of drilling rigs in operation at the conclusion of each quarter during the taxable years 1967, 1968, and 1969.

Response: Information necessary to answer interrogatory No. 24 is not known to me.

25. Please state the number of meals customarily provided by Plaintiff each day to an individual employed on one of Plaintiff's drilling rigs.

Response: Plaintiff customarily provided three meals per day to individuals employed on some of its drilling rigs and no meals to individuals employed on other of its drilling rigs.

26. With respect to each of the taxable years in question, state how the furnishing of food by Plaintiff to Plaintiff's employee's was treated in Plaintiff's books and records.

Response: During the taxable years in question, cost of furnishing food by Plaintiff to its employees was charged to catering account as an expense incurred in operating the applicable drilling rig.

27. With respect to each of the taxable years 1967, 1968, and 1969, state what Plaintiff contends the fair market value to have been for each meal furnished an employee on a daily basis.

Response: Plaintiff is informed that the Internal Revenue Agent making the audit in this case assigned a market value of $6.00 per day for meals and lodging in making

the calculations for determining the amounts of the assessments. Plaintiff contends that the meals and lodging were not compensation by Plaintiff for services rendered by the respective recipient employees and, therefore, not subject to the FICA and FUTA tax assessed in this case.

28. Described in detail the formula or method used by Plaintiff in determining the fair market value of each meal furnished by Plaintiff to its employees on a daily basis during each of the years 1967, 1968, and 1969.

Response: See Response to Interrogatory 27.

29. State the name and last known address of each individual who participated in either the determination of the dollar value of meals furnished by Plaintiff to its employees on drilling rigs during each of the years 1967, 1968, and 1969, or in the determination of the manner in which such matters were to be treated in Plaintiff's books and records. With respect to each such individual, state his or her position, if any, with Plaintiff, and briefly describe the individual's duties and responsibilities, as they related to Plaintiff.

Response: See Response to Interrogatory 27.

30. Describe in sufficient detail as to uniquely identify all documents, writings, lists, receipts, or other records which reflect the dollar value of the meals furnished by Plaintiff to its employees during the years 1967, 1968, and 1969. With respect to each, state the location and give the name and address of the custodian thereof. (In lieu of a response regarding a particular item, you may attach a copy of the document or writing to your answers to these interrogatories.)

Response: See Response to Interrogatory 27.

31. With respect to each of the taxable years in question, state how the furnishing of lodging by Plaintiff to Plaintiff's employees was treated in Plaintiff's books and records.

Response: The lodging facilities on applicable drilling rigs are part of the structure of such rig and the cost thereof was charged to the capital account of the rig.

32. With respect to each of the taxable years 1967, 1968, and 1969, state what Plaintiff contends the fair market value to have been for each day of lodging furnished an employee.

Response: See Response to Interrogatory 27.

33. Describe in detail the formula or method used by Plaintiff in determining the fair market value of a day's lodging furnished by Plaintiff to its employees on a daily basis during each of the years 1967, 1968, and 1969.

Response: See Response to Interrogatory 27.

34. State the name and last known address of each individual who participated in either the determination of the dollar value of lodging furnished by Plaintiff to its employees on drilling rigs during each of the years 1967, 1968, and 1969, or in the determination of the manner in which such matters were to be treated in Plaintiff's books and records. With respect to each such individual, state his or her position, if any, with Plaintiff, and briefly describe the individual's duties and responsibilites as they related to Plaintiff.

Response: See Response to Interrogatory 27.

35. Describe in sufficient detail as to uniquely identify all documents, writings, lists, receipts, or other records which reflect the dollar value of the lodging furnished by Plaintiff to its employees during the years 1967, 1968, and 1969. With respect to each, state the location and give the name and address of the custodian thereof. (In lieu of a response regarding a particular item, you may attach a copy of the document or writing to your answers to these interrogatories.)

Response: See Response to Interrogatory 27.

36. State whether third-party individuals, persons not employed by Plaintiff, were charged for meals or lodging made available by Plaintiff at the site of a drilling rig during each of the years 1967, 1968, and 1969.

Response: The employers of third-party individuals in excess of those regularly provided for in meal schedules of applicable catering contracts were invoiced for meals at certain of Plaintiff's drilling rigs during the years 1967, 1968 and 1969, but not lodging.

37. If your answer to the preceding interrogatory is in the affirmative, state the amount charged for meals and for lodging during each of the years 1967, 1968, and 1969.

Response: The amount charged for meals was the unit amount provided for in various applicable catering contracts with no profit to Plaintiff, but exact amount is not know to me.

38. State whether Plaintiff contends there were alternative facilities available (other than those of Plaintiff) from which Plaintiff's employees on drilling rigs could reasonably have been expected to obtain meals during the years 1967, 1968, and 1969.

Response: Plaintiff contends that, whether or not facilities other than those of Plaintiff from which Plaintiff's employees could obtain meals were available, meals and lodging furnished by Plaintiff to some of its drilling rig crews on particular rigs were not furnished as compensation for services and, therefore, not subject to FICA and FUTA taxes.

39. If your answer to the proceding interrogatory is in the affirmative, state the following with respect to each such alternative facility:

(a) The name and address of the alternative facility;

(b) the identification of the drilling rig to which it was an alternative;

(c) the distance between such alternative facility and the drilling rig; and

(d) the transportation that was available between each such alternative facility and the drilling rig.

Response: See Response to Interrogatories 27 and 38.

40. State whether Plaintiff contends there were alternative facilities available (other than those of Plaintiff) from which Plaintiff's employees on drilling rigs could reasonably have been expected to obtain lodging during the years 1967, 1968, and 1969.

Response: See Response to Interrogatories 27 and 38.

41. If your answer to the preceding interrogatory is in the affirmative, state the following with respect to each such alternative facility:

(a) The name and address of the alternative facility;

(b) the identification of the drilling rig to which it was an alternative;

(c) the distance between such alternative facility and the drilling rig; and

(d) the transportation that was available between each such alternative facility and the drilling rig.

Response: See Response to Interrogatories 27 and 38.

42. State the name and address of the person who has possession of the books of accounts, balance sheets, and financial statements for Plaintiff as they pertain to the taxable years 1967, 1968, and 1969.

Response: Books of accounts, balance sheets and financial statements of Plaintiff pertinent to taxable years 1967, 1968, and 1969 are in the possession of Mr. Fred Ryan, 1900 Post Oak Tower, 5051 Westheimer, Houston, Texas 77056.

43. In the complaint herein, the statement is made that "The meals and lodgings furnished to drilling rig employees, as aforesaid, do not constitute wages, as defined in IRC § 3401(a) in regard to withholding income tax; IRC § 3121(a) in regard to FICA taxes; and IRC § 3306 (b) in regard to FUTA taxes and valid regulations promulgated thereunder." With respect to such statement, give the following information:

(a) State all the facts upon which the Plaintiff bases that statement; and

(b) state the name and address of each person who has personal knowledge of some or all of the facts contained in your answer to subparagraph (a), above.

(c) If the facts contained in your answer to subparagraph (a), above, are based in whole or in part on one or more writings, describe each such writing in such detail so as to uniquely identify it and state the name and present address of the custodian thereof.

Response: Please consult our attorney, who wrote the complaint, for the information about which inquiry is made in this interrogatory.

44. List and describe in detail each and every document, writing, or other tangible item, exhibit, chart, or graph relied upon in support of Plaintiff's claim in this action not hereinbefore identified. With respect to each, indicate the exact location as well as the name, present address, and title of the individual who has custody of the documentary evidence. (In lieu of each answer and description, a copy of the document may be attached to the answers to these interrogatories.)

Response: The matters inquired about which our attorney will elect to rely upon at time of trial in support of

Plaintiff's claim at this point in this case are not known to the undersigned.

45. List the names, present or last known addresses, and any other identification of all persons relied upon in support of Plaintiff's claim in this action, indicating the nature and substance of the testimony which each person would be expected to give if called as a witness, and stating the relation, if any, to the Plaintiff.

Response: See Response to Interrogatory 44.

46. State the names and present or last known addresses of all persons not previously identified in your answers to these interrogatories who may have knowledge or information regarding the Plaintiff's claim in this action.

Response: See Response to Interrogatory 44.

47. State the name of each person who advised, assisted, or provided information for the preparation of answers to these interrogatories.

Response: Our attorney of record, Mr. Elmer Theis, advised and assisted in the preparation of answers to these interrogatories.

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority on this day personally appeared J. C. Magner, who is a Senior Vice President of Rowan Companies, Inc., and, having been by me first duly sworn, stated on his oath that he is an authorized agent of Rowan Companies, Inc., Plaintiff in the above styled and numbered cause, that he has prepared the foregoing answers to interrogatories, that he is authorized to do so, and that the statements contained therein are true and correct.

/s/ J. C. MAGNER
J. C. Magner

SUBSCRIBED AND SWORN To before me this 4th day of May, 1976.

/s/ ROBERT G. CROYLE
Robert G. Croyle
Notary Public in and for Harris County, Texas

[SEAL] My Commission Expires June 1, 1977.

[1] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 75-H-1818

ROWAN COMPANIES, INC.

VS.

UNITED STATES OF AMERICA

Filed March 24, 1977

ANSWERS AND DEPOSITION OF J. C. MAGNER, produced as a witness at the instance of the Defendant, taken in the above-styled and numbered cause on the 14th day of October, A.D., 1976, at 10:30 o'clock a.m., before Wayne Hutson, a Notary Public in and for Harris County, Texas, at the offices of Rowan Companies, Inc., located at 1820 South Post Oak Tower, in the City of Houston, County of Harris, State of Texas, in accordance with the Agreement hereinafter set forth.

[2] APPEARANCES:

For the Plaintiff:

ELMER H. THEIS, Esq.
930 Dresser Tower,
Houston, Texas 77002

For the Defendant:

JOE W. BURKETT, Esq.
Attorney, Tax Division,
Department of Justice,
Room 8B37,
1100 Commerce Street,
Dallas, Texas 75242

[3]

AGREEMENT

It is hereby agreed, by and between the parties hereto, through their attorneys appearing herein, that any and all objections to any question or answer herein, either as to form or substance, may be made upon the offering of this deposition in evidence upon the trial of this cause with the same force and effect as though the witness were present in person and testifying from the witness stand.

It is further agreed by and between the parties hereto, through their attorneys appearing herein, that this deposition may be signed before any Notary Public in and for the State of Texas, at any time before or during the trial, and thereafter returned into Court and used on the trial of this cause with the same force and effect as though all requirements of the rules and statutes with reference to signature and return had been fully complied with.

[4]

J. C. Magner

the witness hereinbefore named, being first duly cautioned and sworn to testify, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BURKETT:

Q. Would you state your full name, please, sir.
A. My full name is John Cruse Magner.

Q. Where do you reside, sir?
A. Houston, Texas.

Q. What is your age?
A. Fifty-four.

Q. Could you state your educational background?
A. I am a graduate—L.L.B. degree from Southern Methodist University in Dallas.

Q. When did you receive that, sir?
A. 1947.

Q. And that is a Bachelor of Law degree?
A. L.L.B.

Q. Where are you currently employed?
A. Rowan Companies, Inc.

Q. In what capacity?
A. Title of Senior Vice President.

Q. Generally, what do your duties entail?
A. I'm in charge of exploration and production for [5] the Company, and serve as general counsel for the Company.

Q. When did you first become associated with Rowan Companies?
A. In June, 1949.

Q. In what capacity were you associated with them first?
A. My initial title was Representative.

Q. And what did your responsibilities involve at that time?
A. I was the Company's general representative in the City of Houston, for sales, production and general representation of the organization.

Q. What is the business in which Rowan Companies is principally involved?
A. Contract drilling service.

Q. Where all, geographically, does Rowan conduct business?
A. Is your question currently, or in connection with the time element——

Q. I think it would be more appropriate for me to address my remarks to the period '67 through '69.
A. During the period '67, '68 and '69, the drilling rig equipment of the Company was generally located in the

New Orleans Division, our western division at Midland, Texas, and our Alaska division in Anchorage.

[6] These are the offices from which operations were conducted.

Q. Could you basically——
A. One moment please.

Q. Excuse me.
A. I cannot remember. We could have had—We closed our Casper, Wyoming, office during the '60s.

I cannot—I believe it was already closed during the interval we speak of.

Q. You mentioned that the services in which Rowan Companies is involved pertained to contract drilling.

Is that the drilling for petroleum, primarily?
A. Yes, for oil and gas.

Q. With whom, during the years '67 through '69, generally speaking, would Rowan engage in such contracts?
A. We contracted our services to most of the major oil companies who operated in the Gulf Coast area during those years, both major oil companies and some independent ones.

Q. Could you name two or three of the major oil companies?
A. Continental Oil Company, Humble, which is now Exxon, Shell Oil Company.

Q. During the years 1967, 1968 and 1969, was there any of these regional offices through which a greater [7] portion of the drilling activity was handled?
A. Yes.

I do not have it in my memory, the percentages, but during these years, we had some continuous operations with certain rigs for certain companies.

For instance, two of the rigs were under contract to Continental Oil Company, during all of this period without interruption.

Q. Excuse me.

I guess my question really would be, was the majority of the drilling activity in the Gulf area during the years we're talking about?

A. The—State that again, now.

Q. Was the majority of the drilling that was being undertaken by Rowan during the years '67, '68 and '69, being undertaken in the geographical region involving the Gulf of Mexico, or was it pretty much spread equally among the four divisional offices you've mentioned?

A. There was quite a division between the dollar volume —would probably be greater in the Gulf Coast during those years.

But we had rigs in all areas, and they were all operating, with the exception of, perhaps, the Rocky Mountain area, which I believe we closed out during those years.

[8] Q. Could you explain what process—let me rephrase that.

What procedures are followed by Rowan after it has entered into a contract with, for example, one of the major oil companies to drill on a particular parcel of land, just in general terms, but with some——

A. I will make an initial comparison as a—perhaps, like any construction contract where the size of the structure could vary tremendously.

But in the drilling contracting business, we move the equipment to the location, be it land or water, and commence to drill a hole to the specifications given us by the operator, and to the depth he desires.

Q. As set forth in the contract?

A. As set forth in the contract.

Q. What drilling equipment is moved to the site where the drilling is to take place?

A. All of it.

Q. Could you tell me what that would include?

A. I presume that would entail a definition of a drilling rig.

Q. Well, really my question is more concerned with the general equipment of whatever nature might customarily be moved to a site by Rowan Companies, customarily so?

[9] A. Well, on our several rigs which had been mentioned, each bears a number, and is identified as a rig which is a collection of the various pieces of equipment, which are maintained as a unit.

Q. And that would vary from specified rig to specified rig?

A. Yes.

For instance, a marine rig might be all contained on one vessel that is moved to the location, and is permanently mounted on a—one of the types would be a Tender, an L.S.T. Tender, a ship.

By contrast, a land operation would be broken down into loads suitable for highway trucking, and then reassembled at a location.

It is a mobile plant, in effect.

Q. Is there a means by which it can be appropriately characterized what general proponents go into this plan?

I don't know if that's an appropriate question as opposed to breaking down——

A. By contrast, how big is a truck?

A. Well, to illustrate the focal point of my question, a truck might involve the cab of the truck or a float or a trailer of "x" feet. It might have "x" number of wheels.

I'm just trying to get a general generic [10] description.

A. In that contrast, any drilling rig would have certain components such as a derrick, by which you suspend the drill pipe which is used to penetrate the hole. It would have a pump, or more than one. It would have a hoisting device similar to a winch to remove the pipe from the hole. It would have to have a source of power to operate all of this machinery.

Those are the basic components that I would suggest exist.

Q. Would there be a platform from which operations are conducted?

A. Is your question relative to water operations or land operations?

Q. Either one.

A. On land operations, depending on the terrain, a pad or location is generally prepared to provide a level area, if possible.

On water, the procedure varies with the depth of water. You would have no permanent installation in 300 foot of water, usually.

Q. What type installation would you have in a situation like——

A. At this point, I must state that in using 300 foot water depth, I may have swayed from the time element [11] '67, '68 and '69.

But during those years, there may have been some drilling in water depths to 300 feet; this would be a maximum with a fixed platform to which a ship of the type I described would be tied up to the permanent platform for the purpose of drilling wells.

Q. Did you indicate that there would be a fixed platform?

A. In that context, some they had that was the upper limits of the technology of that particular period.

Q. How would a platform be "fixed," to use that term?

Is that secured, made immobile? Is that the correct use of that term in the way that you've used it?

A. The platform would be constructed in a shipyard in large sections and transported by boat to the location, and then assembled in telescoping sequences, with the bottom leg penetrating the ocean floor for stability.

Q. And what function would the ship that was involved in this—adjacent to this platform serve?

A. The surface area of the platform, due to the depth of the water and expense would be limited. The accompanying ship or Tender would house the personnel. It would have all of the supplies that are needed, the [12] and, the pipe—would contain the pump and all the other vital equipment essential to drilling a well.

Q. Drilling activities would also, during this time be conducted in areas such as Alaska?

A. Yes.

Q. Would these be offshore operations or would they be on land?

A. Both.

Q. Could you, sir, describe in the same vein that we've mentioned components previously—Could you describe the different personnel that would make up a drilling crew with respect to a drilling operation?

A. As a preliminary statement, a crew could vary from four men to twelve or more men on duty, depending entirely on the type of rig equipment.

Q. How many persons would—If it's fair to use an average figure for a drilling operation taking place offshore in the Gulf of Mexico sometime during the period '67 through '69, what would be an average number of persons involved in such an operation, on the site?

A. That, too is not capable of an exact answer, because of different means of drilling that were employed in those years.

I previously cited to you one of those types. There are others which would require different numbers [13] of personnel.

But, if you will accept a very general average, I would guess that a crew in the magnitude of twelve persons would be in the range of—an average.

Q. Now, would this be the total number of persons on a site at a given time?

A. Again——

Q. Using the general figure.

A. Again, I must qualify that answer.

At certain sites—would permit the changing of crews, daily; other sites would not be suitable for daily change of crews and would require that the personnel remain aboard for their tour of duty.

I would like to qualify the word "require" at this point in that I'm stating that it would not be as convenient for an individual to return from his work location, each day.

Q. Where were operations conducted, if you recall, during the years that we've made reference to, where crews could be changed on a daily basis?

A. At the time of the three-year interval, we had certain rigs which were land-based rigs on which operations, then and now, are customarily on an eight-hour basis and the man drives to his work location.

We had other operations in the southern division [14] to which I am partially confining my remarks, which were on barge-type drilling rigs, operating in canals and swamp areas which were accessible to docks and roads. And the men, also, would work eight-hour tours, returning to their homes each day.

There was no one type of situation existing during these years. In other words, we had different types of rigs and

different types of situations applying throughout the interval.

Q. So basically, if I understand you correctly, the location of the drilling rig, itself, would be a factor or—well, would be a factor with respect to whether a crew would be changed on a daily basis?

A. It was one factor which must be considered with the location of the well to be drilled. In other words, an offshore rig could not work on land, and if it is 50 miles in the Gulf, it can't be near a city.

Q. So we are talking, primarily, about location?

A. Location and type of equipment that would be adaptable to that environment.

Q. Assuming that the appropriate equipment were present at the site, that equipment and that location would be involved in—would be factors with respect to whether crews would be changed on a daily basis?

A. Yes.

[15] Q. Were crews changed on a daily basis in Alaska during the years in question?

A. On certain jobs they were, and on certain jobs they were not, depending on similar environmental situations.

Q. Where was the majority of the drilling activity conducted by Rowan in Alaska during the years we've spoken of?

A. We maintained operations in the Cook Inlet area on fixed platforms, south of Anchorage.

Q. Was this on land or on water?

A. Water.

We also had some land operations, as I say.

Q. Would those have been primarily in the same region?

A. At that time, yes.

Q. The area around the Cook Inlet?

A. In the southern portion of Alaska, yes.

Q. Would the rig that would be used for drilling at the Cook-Inlet-type location be similar to the one you've described previously where there was a platform, stabilized with some type of telescopic cylinder—legs, subsurface——

MR. THEIS: Pardon me, Counsel. I think you're misstating or misreading an answer previously given by [16] the witness when you use the word telescopic.

MR. BURKETT: OK.

BY MR. BURKETT:

Q. Let me rephrase the question.

You've previously described the type of rig that would be used by Rowan Drilling Company during the years in question which would involve a platform that would have been stabilized and some vessel that would—L.S.T. or something that would be adjacent to it.

Is that the same type of apparatus you're taking about in the Cook Inlet area?

A. No.

Q. OK.

A. It would be similar in that it is a platform in the water. However, it has no ship in connection with it. It is what is termed in the industry a self-contained platform where the size of the platform is sufficient to put all of the equipment on top of the platform or on the platform in several levels.

Q. All right, sir.

In the context of the type of rig that you're referring to, what facilities would be—What components or facilities would be there, in addition to the derrick, the hoisting device and some type of motor?

[17] A. Those basic components that I enumerated earlier would be present with any drilling rig.

Q. Yes, sir.

A. The additional components would be, of course, adjusted to the particular environment such as a—The equipment in this instance that you ask would be containerized where it could be picked up in modules and hoisted to the deck of this platform.

Q. Would there be—You mentioned previously in the illustration you've used earlier that supplies would be contained, for example, on the L.S.T.

Would there be space available for supplies in the self-contained units?

A. Yes. It's an essential——

Q. Would there be living quarters available in such a unit?

A. Yes.

Q. Would there be eating quarters available?

A. Yes.

Q. Would there be a kitchen or galley?

A. Right.

Q. What is the proper term to use on such—for such——

A. In a nautical concept, I think a galley is an acceptable term.

[18] Q. With respect to the drilling rigs that would have been on the land area, say in the Alaska division and so forth, would these platforms be, again, the self-contained units you've mentioned?

A. On the land operations?

Q. Yes, sir.

A. No, sir, they would not be.

Q. What would be the difference? Would some of them be self-contained?

A. Again, you're in a mechanical difference between a marine operation and a land operation.

Q. Well, that's basically what I'm asking.

Are all self-contained units restricted, solely to marine use?

A. In the terminology I used, you would not use some phraseology with the land rig. A land rig can be used anywhere on land——

Q. Yes, sir.

A. —and set up, if it is—The other components may not be necessary, is what I'm saying.

Q. In some instances, would those components be used in conjunction with a land rig?

A. If you are particularly referring to a galley.

Q. Well, some storage facility or supply——

MR. THEIS: Pardon me, Counsel, for interrupting.

[19] Are we talking about Rowan's equipment or the industry in general?

MR. BURKETT: I'm speaking with respect to Rowan's equipment.

MR. THEIS: Fine, so we can understand.

THE WITNESS: Are we referring to Rowan's equipment?

In those years, we did not have anything but the basic equipment for a land rig.

BY MR. BURKETT:

Q. All right, sir.

In Alaska, for some of the rigs, would the basic equipment include storage facilities for supplies?

A. Yes.

Q. And would a land rig possibly include a kitchen area?

A. No.

Q. Would—In land rigs would there sometimes be live-in quarters?

A. Again, this——

MR. THEIS: Now, we are speaking about Rowan's equipment?

THE WITNESS: My answer to this will be limited to the years and the rigs that I recall in Alaska that I think were operational. This is all subject [20] to my memory, and if I—If Counsel advises, I may ought to stop here, because I do not have that intrensic a memory.

Can I speak off of the record?

MR. THEIS: Just a minute, Mr. Magner.

The thing I'm having problems with is whether we are slipping from Rowan's equipment into industry equipment, generally; are we confining it solely to the equipment Rowan Companies owned and provided?

MR. BURKETT: Let me rephrase the question.

MR. THEIS: That's what I would like to clarify.

MR. BURKETT: Let me rephrase the question so as to avoid confusion.

BY MR. BURKETT:

Q. Given the time period that we've made reference to, 1967, '68 and '69, and given, for example, a drilling operation in Alaska, and given further, for example, such drilling operations being undertaken on land, do you recall whether such drilling operations in some instances involved, in addition to the derrick, the hoisting device and the motor device, whether in addition there would have been on the side of the drilling facilities storage for supplies, storage for people to [21] stay?

A. In answer to that question, any drilling rig would require facilities for supplies.

Q. Yes, sir.

A. That is a basic concept that is with any rig.

With regard to quarters and cooking, galley facilities for men, the terminology would be for a camp.

Q. All right, sir.

A. During the years in question, Rowan's operations, in Alaska, did not require the use of a camp, because of their proximity to cities where the men could live.

Q. All right, sir.

With respect to such operations, do you recall the length of time that a crew would be involved in drilling activity during a particular day, per day?

MR. THEIS: In Alaska, Counsel?

MR. BURKETT: Yes, sir.

We're using the same example that I previously referred to.

THE WITNESS: They work for eight-hour shifts and go home.

That question is answered to your specific question, in Alaska, on land operations, during the time we're discussing.

BY MR. BURKETT:

[22] Q. All right, sir.

Were, in those operations that we set forth in the example that we just used—Were some type of facilities that you've referred to as a camp utilized?

A. To the best of my knowledge, no.

Q. Were any meals used or prepared or served at the site of such operations?

A. No.

Q. With respect to land operations other than those in Alaska that we've been talking about during the years in question—Let me back up and ask one question.

Could you give me a rough percentage as to what percentage of the operations in Alaska were marine, during the years we've talked about?

A. Fifty percent.

Q. During this same time period were camps used in conjunction with land operations of Rowan Companies, other than in the Alaska sphere?

A. No.

Let me make a general statement. In the use of land rigs, as the industry technology has changed, men are not traditionally quartered on the job. The use of marine equipment is relatively new, and has brought about the occasion for quartering of men on the site.

[23] My answer to your last question is, to the best of my knowledge, I don't think we had any land operations during those years that required camps.

Q. All right, sir.

With respect to marine operations during the years 1967, '68 and '69—And for purposes of clarification for the record, unless I specifically make reference to some other time period, we're speaking of those three years.

Could you indicate to me, sir—We may have touched on this earlier, but could you indicate to me, briefly, the number of persons involved or who would make up a crew in a rig that was not on land?

A. Your question, now, is the number of persons in a crew on a marine operation?

Q. Yes, sir, and for purposes of clarification, when I say crew, I may not be using that in a technically precise way that the industry might, so if you could—When I use crew, I'm talking about all persons involved on the site, in the operation.

MR. THEIS: Just a second, Counsel. Let me narrow your definition so we really know what you're asking for.

When you say crew in the context in which you described crew, we are referring solely to Rowan Company [24] employees or other companies as well?

BY MR. BURKETT:

Q. For the purposes of my understanding, could you indicate to me the different persons and their capacities that you will find at the site of an offshore drilling rig on a given, average day?

A. No, sir.

I don't believe that you can do that, because one of the essentials is—By comparison, are you speaking of a submarine or a battleship? The complement would vary that much.

You have limited your question in this particular situation to a marine operation.

Q. Yes, sir.

A. I have previously stated that we had several types of marine operations during the years, with different types of drilling rigs.

Q. Could you, for purposes of my understanding, indicate to me the distinguishing factors between the different operations?

A. A crew on the Tender type rig, that we have discussed at some length, would require people with a seaman's background to maintain the ship, that would have many other duties in keeping that vehicle operative, as well as personnel qualified to perform the functions of [25] drilling the well, which I have explained to you, is a basic function of any drilling rig.

The type of equipment would cause a change in the number of additional personnel, above a drilling crew, to conduct that particular operation.

I have discussed with you a self-contained platform. It would not need personnel, as such, to maintain the drilling Tender, but would need other type of personnel, such as a roustabout, to maintain the modules and the units aboard it, as well as perform the basic function of drilling.

Q. So basically, then, we're speaking of two general types of drilling rigs, the self-contained and the——
A. No, sir.

There's still a third type.

Q. OK.
A. If you only knew more about the drilling industry.

Mr. Theis: Just a second.

We are not confining ourselves to drilling rigs on water owned by Rowan Companies, are we, or are we describing the industry—the various types of rigs in the water——

Mr. Burkett: I'm trying to limit my question [26] to the types of rigs on which personnel associated with Rowan Companies would have been engaged during the years 1967, '68 and '69.

Mr. Theis: I asked you to define your questions solely to Rowan equipment.

The Witness: My answers have done this.

To be specific, in the last exception, we have what is called an inland-barge rig. This is a vessel, some 200 feet long, 54 feet wide, that can be floated down a canal or a bayou, and can be sunk at a given location by pumping water into the hull, and there it remains for the purpose and time necessary to drill a well.

Q. All right, sir.

We have, then, a self-contained——
A. Platform.

Q. —platform.

There is the——
A. Tender operation.

Q. The Tender operation.
A. And a barge operation.

Q. The submersable-barge operation?
A. The submersable-barge operation.

Q. And all three of these were in use——
A. During the years, yes.

Q. During the years we're talking about?
[27] A. As well as land operations.

Q. Yes.

With respect to submersable-barge operations, could you indicate to me during the years in question roughly what percentage of the operations involved that type of apparatus?

A. It's my recollection that we had about four drilling barges during those years.

Q. Could you give me a "ball park figure" for what type of percentage that would be of your overall operations?

MR. THEIS: Overall water or overall land or overall total operations?

BY MR. BURKETT:

Q. Both.

First, overall water.
A. We must define, again, our operations.

MR. THEIS: Counsel, let me interrupt you.

I'm not trying to get you off your questioning, but I'm wondering—Let me put it this way. I fail to grasp the materiality of the line of questions you're asking. I'm not

going to ask him not to answer them. I just wonder if we're wasting time.

MR. BURKETT: Well, I do feel some need to get comprehensive background of the operations.

[28] MR. THEIS: Procede with your questions, then.

BY MR. BURKETT:

Q. Do you know how many offshore rigs you had, not submersable-barges, but other Tender operations during the years in question?

A. We owned two rigs, two Tender rigs and operated one other by charter.

Q. How many persons would comprise—How many persons would be involved in the operations of Rowan Company at the site of the Tender-type rigs?

A. I will attempt to answer that question.

However, that is not a matter that I, in my particular category with the company, am as intimate as some of the other persons that you choose to—to conduct a deposition.

But I would estimate that a—two crews of approximately ten persons each would be aboard it at one time.

Q. And what positions would there be on such crews?

A. You want job classification, names?

Q. Yes, job classifications.

A. The rig would have a drilling superintendent or tool pusher. Those names are usually synonomous.

It would have a driller, or two drillers, counting the context in which I have mentioned this.

[29] Q. One on each of the two crews?

A. Right.

You would have the terminology of a derrick man on each crew. It would have an engine man. It would have

two or possibly three floormen. It would have a welder. It would have two or more roustabouts.

Q. What would be the length of time that each of the two crews would work each day?

A. Twelve hours.

Q. In other words, operations would be continuous around the clock?

A. Right.

Q. Would it be a twelve-on, twelve-off type operation; or would it be broken down into twelve hourly segments?

A. Twelve on, twelve off.

Q. When would each—As a general matter, would the crews shift at 6:00 and 6:00 or 12 noon and 12 midnight?

A. 12 midnight is the most acceptable, but it generally varies. But that's the—from 12 noon to midnight and then from midnight until noon again.

Q. With respect to such offshore operations, when would a crew be changed, generally?

A. This has varied materially, and the answer— [30] In the years that we speak of, my recollection is that a shift of ten days on and five days off was most common, where the operation was conducted on that type of schedule.

You have limited your question to a Tender operation, and I am still answering in that context, to that question.

Q. In a self-contained operation, what periods would be involved with respect to change of crews?

A. Probably the same.

Q. Ten days on, five off?

A. Twelve-hour shifts. A land operation would have a different situation.

Q. What type of living facilities were available in a Tender-type operation during the years in question?

A. Could you be more specific with your question?

A. Well, I'm trying to ascertain with respect to the Tender—Is the Tender a vessel? Is that what we're referring to when we say a Tender?

A. Yes. That's the L.S.T. type.

Q. The L.S.T. that's in conjunction with the drilling operation?

A. L.S.T. type.

Q. All right, sir.

Where would a person stay when he was not [31] actually on duty?

A. He would have a bedroom, usually, with two bunks or possibly four bunks in a room. Each man would have his own desk, his own—It would be a small dormitory-type room, quite adequate bathroom facilities, recreation room and so forth.

Q. What would be—What would constitute the recreation room or recreation area? What was available there?

A. Tables, chairs, lamps, library, television if it was in range, radio and similar comforts.

Q. What expense was incurred by Rowan with respect to the daily operation of such rooms?

A. You will have to ask more information.

Q. Well, for example, in a previous instance where we discussed some of the matters in question here, it was my understanding that, for example, laundry for the beds and so forth might be one of the type expenses incurred with respect to the use of a Tender operation; is that correct?

A. The rig or the Tender, in this case, which your question is, would have a heavy duty washing machine available for use by the men, at no charge, to clean his clothes; or in some instances, the catering service would do that for him, at no charge.

[32] Q. Well, would bedding equipment be provided?

A. Yes.

Q. What would that include?

A. Sheets, pillow cases, blankets, all that a person needs to sleep comfortably.

Q. Would that be provided by the catering company?

A. Rowan would provide the articles of bedding, but the caterer would do the maid service, if you call it, to change the sheets and launder them and put them back on the beds and keep the quarters clean.

Q. Were persons, associated with catering operations, on the L.S.T.?

A. Yes.

Q. At all times while the operations were being conducted?

A. Yes, yes.

Q. What persons would these be?

A. These would be the employees of the caterer who are hired for that purpose.

Q. What all persons would this include?

A. Are you—Is your question, now, for me to list the classifications of personnel provided by the caterer?

Q. Just in a general sense, as you understood, who was present on the L.S.T. on behalf of the caterer.

[33] A. I am limited in my answer, here; but they would have persons who are capable of cooking and cleaning up the kitchen, as well as, perhaps, in their off duty, when they're not eating, to utilize their time by maintaining the quarters aboard the vessel.

Q. All right, sir. What——

A. The exact number and title, I don't know that.

Q. I understand.

A. Two or three.

Q. What type facilities were available for eating in such a Tender operation?

A. It had a galley, dining room, if you prefer to call it that, that all personnel used. This would be a room with tables, enough for ten men, perhaps four or five tables, with the food served in buffet style.

A man could select the food of his choice.

Q. How often would food be brought to such an L.S.T. by the caterer or by someone else?

A. As required.

Q. I mean is that something done—Is there some supply type operation that——

A. The rig is equipped with frozen food facilities, lockers and storage.

Q. How would that be replenished?

A. Boats would bring out new foodstuffs.

[34] As you know, you can order staples in large supplies. Some fresh foods would be brought out periodically.

I can't describe a routine. It's as needed to provide wholesome meals at all times, as per their contract.

If I may interrupt, I do have a 1:30 commitment—that I didn't realize this deposition would take this long, which is in about five minutes.

MR. BURKETT: Could we go off the record.

(Discussion off the record.)

(Whereupon, a noon recess was taken.)

MR. BURKETT: Back on the record.

BY MR. BURKETT:

Q. Were facilities sometimes made available to persons visiting the drilling rig sites, but who were not there for purposes of being members of drilling crews?

A. You're saying "purposes," did you say?

Q. Would space be made available, occasionally, for someone to, say, stay on a drilling rig overnight who was not a member of the drilling crew?

A. Yes.

Q. Were there regular hours that meals were served, generally?

[35] A. Yes, for a two-hour period, four times a day.

Q. And when would those periods occur, roughly?

A. Breakfast, lunch, dinner. And at midnight the would usually have——

Q. What trade associations, if any, does Rowan Companies belong to?

A. Well, quite a few.

Q. Could you name some of the more significant ones?

A. I'm speaking in the context now, of '67, '68 and '69.

Q. Yes, sir.

A. We're members of the—It was then known as the American Association of Oil Well Drilling Contractors. The name has since been changed to the International Association of Drilling Contractors. We're members of the American Petroleum Institute.

Those are the two main ones.

Q. How many companies might bid for a particular contract?

A. There is no set answer to that question. A contract could be negotiated with an individual contractor who would, perhaps, construct a rig and design it for a particular need or—Now, I'm speaking generally, of drilling in general in these years.

[36] Q. Yes, sir.

A. Or, if bids were mailed, they might have 20 contractors bidding on the same job if rigs are in great supply, and there are a lot of rigs in that area.

Q. In the years is question, who, associated with Rowan, would be primarily involved with or responsible for the submission of bids?

A. The submission of bids during that period, as well as now, is a top management function in which many people collaborate to reach the final proposal.

Q. Is there anyone under whose offices that might be centralized or coordinated?

A. Yes, the office of the Chairman of the Board and Chief Executive Officer of the Company.

Q. And his name would be?

A. In those years it was Mr. M. G. Rowe, now deceased.

Q. Are drilling contract matters with respect to these offshore contracts—arrangements pretty competitive?

A. Yes.

Q. Highly competitive?

A. Yes, in general.

I mean you're asking me a classed question, again.

[37] Q. Yes, sir.

A. And I wish to state that my answer must have some qualification there.

There were instances where certain rigs might not be in a highly competitive situation if it's a unique arrangement.

Q. As a general matter, sir, if it is fair to ask the question in that form, how would crew members for drilling rigs be hired? Where would they make application, or where would they be solicited? What procedures would they generally use?

A. In a variety of manners.

The most common procedure at the time of this discussion would be in either our New Orleans or our Morgan City offices, for the rigs operated in our southern division.

Q. Who would have been in charge of the Morgan City operation?

A. The Morgan City operation was only a warehouse-type office that had a warehouseman in charge, and it functioned through our division office at New Orleans, but was a geographically well located spot for men to fill out application blanks and reach our operations.

The entire area was under the supervision of Mr. C. W. Yancey, who was then the division manager in [38] New Orleans for the rigs offshore in question that we're discussing.

Q. All right, sir.

If a person came to the Morgan City office and wanted to become a member of a drilling rig crew, who would he contact in Morgan City?

A. Whoever may be in the office on that occasion, different personnel of the company. We maintain clerks, and as I say, a superintendent, any one of whom could take the application and then submit it to others for——

Q. Was it done on written application?

A. A lot.

Q. What other procedures were used?

A. That's about it, if we were hiring.

Q. How would Rowan make known whether or not they were hiring?

A. When the man asked, we would tell him.

Q. If, for instance, Rowan entered into a contract for a certain drilling site, and it was supposed to begin at a certain date, would Rowan try to get a crew together?

A. Rowan would meet its contractual obligations to provide personnel as specified in the contract.

Q. Whose duties would involve getting the crew?

A. The superintendent in charge of that particular operation, through coordination with all other phases of [39] the

Company—would transfer his crews. But most—To better answer your question, each of these rigs remains as an entity, and it has a work force connected with it that, in some cases, doesn't even change for a period of time. Some men may work on the same rig a matter of years; others move up.

But we have a reservoir and backlog of rig personnel.

Q. Who would keep the records with respect to such reservoir personnel?

A. It would be done in that area at the division level, in our New Orleans office, with, perhaps, comparable records in our Morgan City field office.

Q. Do you know whose immediate responsibilities would involve that?

A. Whoever, over the period of years—That would be several people. You understand, you're asking questions over a lapse of three years.

Q. Can you think of some of the individuals that would be involved?

A. I would have to check names to see who was there at that time.

Q. You mentioned, with respect to submission of bids, that this would be coordinated with several people being involved; is that correct?

[40] A. Yes.

Q. Were different facets of the bid handled by specific individuals?

In other words, would there be something of a special situation of a particular component?

A. Yes, very much.

Q. With respect to the matters pertaining to boarding and lodging of employees, under whose supervision would those matters have come during 1967 through '69?

MR. THEIS: Let me stop you for clarification.

You're directing that question in reference to feeding and lodging crew members?

MR. BURKETT: Uh-huh.

MR. THEIS: Go ahead, so we understand it.

THE WITNESS: If the contract requests from an operator, an oil company, specified that Rowan was to furnish the meals and lodging, it would be a function, at that time, wherein the office of Mr. Yancey, whom I've referred to, would probably solicit a quotation from a catering company, such as Universal, for the cost of catering the number of people anticipated for that particular contract.

Q. With respect to the payment of wages and salaries to crews, who would have responsibility with [41] respect to the determination of that component for a bid?

A. The wage scale used within the Company was established by the top management as being the applicable rate, if we refer to the hourly rate people as being the rate applicable to particular job classifications during that period of time.

Q. I'm not sure I'm understanding you.

A. The management of the Company, top management, would make the decision that a given classification of personnel, such as a driller, would be entitled to receive an hourly rate of payment of so many dollars.

MR. THEIS: Is that clear to you?

MR. BURKETT: Yes and no.

MR. THEIS: If you'll permit me, I'll ask one question to straighten it out.

The determination of what hourly rate a driller would get was or was not made at the time of each contract to operate the rig?

THE WITNESS: Our procedure is that during—Our procedure is that effective, for example, November 1, 1968, the hourly rate paid to drillers in the Gulf Coast division shall be so much per hour. All jobs calculated during that interval, until it changes again, would be based on that:

BY MR. BURKETT:

[42] Who would participate in such a determination being made?

A. The top management of the Company, based on——

Q. I mean——

A. The Chairman of the Board and Chief Executive Officer.

Q. And he—Well, would it be fair to say that other persons were involved with respect to some calculation or computation being made at our about November 1, 1968—the scale to be paid to drillers would be changed?

A. That's right.

Q. What different offices would be involved in those matters.?

A. Any one of our operating people, our personnel people.

Q. Generally, can you name the job description of people who would be involved in it?

A. Our personnel director, our vice president of operations for that area, Mr. Yancey.

Q. Who was the Vice President of Operations for that area?

A. Mr. Yancey was at that time.

Q. Who was the director of personnel?

A. Mr. Mark Hart, and his assistant, whom you have heard is Mr. John S. Jackson—is the manager now.

[43] Other factors such as the rate increases or other things affecting costs, all public criteria information, is available to management as to the criteria for wages.

Q. Would there usually be a relatively uniform change among the industry?

A. Not—Nothing uniform. Occasionally some other contractors would raise wages.

Q. Would Rowan follow suit?

A. Sometimes.

Sometimes we were already ahead of them.

Q. Would these matters be fairly competitive and in that regard, uniform throughout the industry?

A. No. There's no uniformity in this industry.

What I'm saying by that answer is that the rates—Again, I am referring, in these remarks, primarily, to the Gulf Coast, with the rigs we've discussed. And in that area, a different rate of pay could apply for a land rig operation in West Texas so that you may have different rates of pay, different work schedules, different environment in different regions.

So it's an extremely difficult industry to categorize as to these matters of wages.

Q. Would wage rates with respect to offshore drilling generally be higher than with respect to West Texas [44] rates, for example, during the period we're talking about?

A. The annual gross income might be slightly more, but the number of hours worked would vary considerably, the reason being that a schedule of fourteen days on and seven days off, which I described on one given instance, would end up with less annual hours worked and a schedule on a land rig which, in the years in question, probably was in the range of a 42-hour week, with six days on, one day off.

Q. OK.

Could you summarize whatever you just said, because I'm not sure that I gleaned the import of your response.

A. Well, in summary, a man who works a work schedule of six days on and one day off or six days on and two days off works more hours in a year than an individual who works twelve hours a day—but for ten days on and five days completely off with no hours of work.

Q. Was the annual income, then, going to be roughly the same?

A. Yes.

Q. Are these operations offshore subject to maritime law?

MR. THEIS: What do you mean by maritime law, Counsel?

[45] There's a lot of maritime regulation laws out there.

I'd like to have you narrow it down some?

MR. BURKETT: Let me rephrase it, then.

BY MR. BURKETT:

Q. In some areas, does maritime law have application to the offshore operations?

A. I will join counsel in—When you say maritime law, I'm acquainted with many phases of that.

Would you be more specific?

Q. Well, I'm asking generally, does any maritime law, to your knowledge, have some application to operations that are offshore?

MR. THEIS: Counsel, let me interrupt you there, hopefully to clarify.

If, for example, you would have a cargo ship colliding with a drilling rig out there, admiralty law would apply.

Then again, you take another occurance, it may not apply.

MR. BURKETT: OK. I'm not sure if that clarifies it.

Let's say we had a cargo ship that ran into a drilling rig.

MR. THEIS: Well, I'll explain it this way, you [46] can have a ship running into a dock, and it's admiralty law—a fixed place on shore.

BY MR. BURKETT:

A. All right, sir.

And depending on what you're driving at—I'm just curious, as a general matter, whether maritime or admiralty law has application to some of these offshore matters, if you know.

A. Yes, sir.

I have reasonably good knowledge. I'm having trouble with the question.

Q. Well, I'm not sure that the question——

A. In a lighter vein, a rig, on some occasions has been deemed to be a vessel which does invoke some——

MR. THEIS: Mr. Magner, I'm going to ask you not to answer that question without clarification, because we're getting into this, for example—and I'm not trying to be difficult here—You take a situation where a rig crew member is injured, now, under the Jones Act and maritime tort law, he, in all probability, would be called a seaman. And you can have another situation arise, unrelated to a tort act, and he would not be a seaman.

So we might create confusion by generalizing too much in admiralty law.

[47] If Counsel would specifically cite the instance, that might be a little bit more helpful, and then that's another question, whether Mr. Magner wants to classify himself as an expert in law or merely a factual witness.

MR. BURKETT: Well, my understanding of his earlier testimony was that some of his duties involved counsel with regard to activities of Rowan Companies.

MR. THEIS: That's true.

MR. BURKETT: And my understanding of the colloquy we just had would be that in some areas Admiralty or Maritime Law might have application with respect to offshore activities. For specific application, one would need to know the factual circumstances to which the inquiry would be directed.

MR. THEIS: I believe that's about what I said, yes.

MR. BURKETT: All right, sir.

I was just making a general inquiry as to——

MR. THEIS: I may not agree with Counsel's opinion about it, but that's his opinion, and I'll have my own.

BY MR. BURKETT:

Q. Well, let me ask, as a general matter, what areas of application would admiralty or maritime law have with respect to offshore activities.

[48] Are there some general areas with respect to which these have application, than the conduct of your activities with Rowan—there's a frequent application of these matters or that the activities would be subject to these matters?

MR. THEIS: Counsel, I hate to be interrupting. I'm not trying to delay anything; nor do I have any idea what his answer may be, but I have trouble with the question.

Now, we're talking about these years, about what we refer to as a submersable or sinkable barge rig. We're talking about Tender-offshore rigs. We're talking about self-contained, platform type rigs.

Now, there's a question of which of those rigs would fall under the admiralty classification. For example, I'll give you this much, if you will permit me to lengthen your record, Counsel.

For example, the platform rig, insofar as the crew members are concerned, would not have the benefit of the Jones Act. They'd come under the longshoremen's and harbor worker's act.

MR. BURKETT: I don't know if this is appropriate right now for the purposes of inquiry. If the witness does not understand my question——

MR. THEIS: It's too broad, is what I'm saying. [49] Your question is too broad. It's difficult for me to understand what you're getting at—whether the witness can even answer it that way.

MR. BURKETT: I didn't understand the witness to have trouble with it.

MR. THEIS: Ask him again or whatever you want to ask him.

BY MR. BURKETT:

Q. Mr. Magner, I'm going to show you what we will, for purposes of identification, mark as Exhibit 1 to the deposition, which proports to be an extract from a contract entered into between Rowan and Continental Oil Company and just ask you if you recall having seen this and if you can identify this as such.

(The instruments referred to were here marked Defendant's No. 1(a) through (d) and 2 for identification, and same are attached hereto.)

MR. BURKETT: Let's go off the record.

(Discussion off the record.)

MR. BURKETT: Back on the record.

MR. THEIS: It's agreed by and between the attorney for the Plaintiff and the attorney for the Defendant in the instant case that Defendant's Exhibit 1(a) through (d) and Exhibit 2 may be and shall be attached to and become a part of the deposition; and each of said Exhibits can be offered in evidence at the time of [50] trial, by either party, without further identification or objection to lack of identification of any kind.

MR. BURKETT: This is agreed.

BY MR. BURKETT:

Q. Are you familiar with different unions whose membership would be involved in drilling activities?

A. No, I'm not.

Q. Are there any such, to your knowledge, in the Gulf Coast area?

A. Not to my knowledge.

Q. Are there any associations or other types of groups to which such drilling operators, or did you mean employees, which? The word operator connotates the oil company.

MR. BURKETT: All right. Excuse me.

BY MR. BURKETT:

Q. Are there associations or groups to which drilling crew members, employees, would belong?

A. The crew members all have some opportunity with the association. I mean they're the independent association of drilling contractors. They have educational seminars and things that are available to men on the rigs. Membership, as such, is not personal. It's by company.

So, in that context, they participate in the [51] activities. They give safety awards and recognize crew members in that vein. So they——

Q. How large is the membership of the—Is it the I.A.D.C.?

A. Yes.

Q. How large is the membership of that?

A. It represents about 400-something drilling contractors and about 2,700 rigs, may be, today.

Q. Yes, sir.

A. I can try to think back for the years we're discussing. It would vary—probably more contractors.

Q. More contractors today?

A. Then. Many went broke.

Q. During the years in question, how were crews transported to and from drilling rigs?

A. That's too general a question.

Q. On offshore type rigs, how would crew members get to and from such operations?

A. The greatest use of transportation would be a boat; although some crews can be changed by helicopter.

Q. Was that true back in the years we're talking about?

A. Yes, some, but mostly by boat from a landing. They had to reach the landing by their own device or something.

[52] Q. How would they know when a boat was going to go to a drilling rig?

A. It was a regular schedule.

Q. Who provides those services?

A. The operator would, normally. Again, this is a variable item, but the operator would normally provide marine transportation, if that's what we're speaking of, or any other type.

Q. All right, sir.

A. But it is a service that could be rendered by either party.

Q. When you say operator, you mean the drilling contractor, such as——

A. No sir. I mean the oil company.

When I say the operator, I mean the oil company for whom we contract our services.

Q. Is it customary for there to be a particular individual whose responsibility involved contact with I.A.D.C.?

A. No.

Q. Would there have been someone whose job would have substantially involved liaison or contact with I.A.D.C.—well, in its previous nomenclature, in the years '67 through '69?

MR. THEIS: Let me interrupt again, Counsel.

[53] Contact by whom, Rowan Company or Rowan's employees?

MR. BURKETT: Either.

I was making reference primarily to Rowan having contact with the I.A.D.C.

BY MR. BURKETT:

Q. Was there any type of uniform procedure?

A. No.

I'll try to answer your question and give a little bit of structure of the organization.

During those years—It has a Board of Directors, as a trade association. Members of our Company, in the years in question, were members of that board. The association, also, has committees of various types, standing committees, safety and so forth.

Q. Does it issue publications?

A. Some, not a monthly or—But they do write letters, communications, to their members on different topics.

We might have a man who serves on a committee for a period of time and functions either as a member of the Committee or possibly Chairman of it.

Q. For example, correspondence from the I.A.D.C. could go to one or more officers of the Company?

A. Right, or other people, out to the superintendents [54] or throughout our—It goes throughout our organization. It's not limited to—depending on the nature of the material.

Q. Sir, previously interrogatories were propounded to Rowan Companies, and I need to ask you a couple of questions with respect to those.

Did you participate in——

MR. THEIS: Counsel, could he have his copy of the interrogatories if you want to refer to them?

MR. BURKETT: I have no objection to that.

MR. THEIS: If you have them on your desk, go get them.

THE WITNESS: OK.

BY MR. BURKETT:

Q. Some of the matters I need clarification for have been developed this morning. But referring to Interrogatory No. 15a and the Response with respect to the inquiry concerning minimum salary paid an individual performing services on any plaintiff's drilling rig, the answer was $2.06 per hour.

Is that figure based on on-time? In other words, as I understand it, a person would be, in a particular example, on a 12-hour shift.

For purposes of clarification, and for my understanding of this answer, when $2.06 is used, is that [55] $2.06 per hour of work that is performed?

A. Yes, $2.06 per hour of work for whatever shift.

MR. BURKETT: All right, sir.

I have no further questions.

MR. THEIS: I'll defer any questions I have to ask of this witness until the time of trial.

/s/ J. C. MAGNER
Witness

STATE OF TEXAS
COUNTY OF HARRIS

Subscribed and sworn to before me by the said witness, J. C. Magner, on this the 21st day of March, A.D., 1976.

/s/ MARY A. CHIASSON
Mary A. Chaisson
Notary Public in and for
Harris County, Texas

[SEAL] My Commission Expires Jan. 4, 1979

[56]

CERTIFICATE FOR FEDERAL COURT

STATE OF TEXAS
COUNTY OF HARRIS

I, Wayne Hutson, a Notary Public duly commissioned and qualified in and for the County of Harris, State of Texas, do hereby certify that, pursuant to notice and the agreement hereto annexed, there came before me on the 14th day of October, 1976, at 10:30 o'clock a.m., at the offices of Rowan Companies, Inc., 1820 South Post Oak Tower, Houston, Texas, the following named person, to-wit: J. C. Magner, who was by me duly sworn to testify the truth, and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; and that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision; and the deposition is a true record of the testimony given by the witness, same to be sworn to and subscribed by said witness before any Notary Public in and for the State of Texas, pursuant to the agreement of the parties.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or [57] financially interested in the action.

In witness whereof, I hereunto set my hand and affixed my notarial seal this 28th day of October, A.D., 1976.

/s/ WAYNE HUTSON
Wayne Hutson, Notary Public in and for Harris County, Texas.

My Commission expires September 25, 1977.

DEFENDANT'S 1(a)

Drilling Contract dated July 16, 1969 between Rowan Drilling Company, Inc. and Continental Oil Company

1. *Exhibit A, Item 13, Catering:*

   Indicates Contractor is to supply lodging and catering services for Contractor, Company and third parties and is to rebill third parties.

Drilling Contract dated March 7, 1968 between Rowan Drilling Company, Inc. and Chevron Oil Company

1. *Page 3, Section 3, Labor; Subparagraph (2):* Indicates Operator is to supply boarding and lodging for employees of Company, Contractor and third parties.
2. *Exhibit "C":* Also indicates Company is to provide food and necessary supplies for boarding and lodging employees of Operator, Contractor and third parties.

DEFENDANT'S 1(b)
CONOCO

	Contractor	Company
B. Vessels or craft to transport personnel required for drilling operations hereunder.	—	X
C. Vessels to transport equipment, materials and supplies used in the work hereunder.	—	X
D. Equipment, supplies and services to move Contractor's drilling rig, other equipment, replacements, and supplies onto a dock, and within reach of a derrick barge, for loading out at the commencement of and during drilling operations contemplated hereunder, and for any movement of same after it is unloaded onto a dock after cessation of said drilling operations.	X	—
E. Equipment (except tugs under 12-A above) to load Contractor's drilling rig, other equipment and supplies from a dock onto cargo vessels and to transport same to the well(s) to be drilled hereunder, and for all offshore loading, unloading and transportation, including transportation of said equipment and supplies to Morgan City, Louisiana, and unloading same onto a dock after completion of the last well drilled hereunder. This shall not include transportation to a third party's location or the movement of Contractor's rig and equipment as provided in Section XII of this contract.	—	X

13. CATERING:

Catering, bed linens, eating utensils, sanitary supplies, food and personnel to provide meals and maintain quarters for employees of Contractor and Company, including employees of subcontractors and service companies, and other personnel authorized by Company to be on the location for operations connected with the drilling operations performed hereunder. Contractor may

	Contractor	Company
bill and collect for its own account, for catering service furnished to Company's subcontractors, service companies and other third parties whose basic rates include the cost of maintenance of their own personnel in the field. Contractor shall not bill Company, or Company's subcontractors, service companies or other third parties whose basic rates do not include such maintenance. Contractor may bill Company for catering service for Company's representatives in excess of an average (computed monthly) of two men per day.	X	—
14. CREWS:		
A. Drilling crews and drilling barge or drilling tender operating and maintenance crews sufficient to perform all operations normally associated with drilling, completing or abandonment operations, and barge or tender operations, including material handling without impairment to drilling progress, and pay all wages and salaries including travel time for such crews. Operations shall be on a continuous basis. List all personnel, including number of crews, number of men each crew, other workmen by job titles, pay scales for work and for travel, scheduled work hours and frequency of crew changes. 2 - 10 man crews on duty at all times, working 12 hour tours 7 days and off 7 days, each crew comprised of 1 driller, 1 derrickman, 1 engineman, 3 floormen, 1 crane operator, 1 pump man, 1 mud man, plus 1 welder. 1 toolpusher on duty at all times. 1 maintenance supervisor when required.	X	—
B. Casing crews shall be furnished by Contractor for Company's account pursuant to Paragraphs "D" of Sections IV and V of this contract.	X	—

DEFENDANT'S 1(c)

CHEVRON

• • • • • • • • • • •

furnished by Contractor, and Contractor shall be required to replace any rejected equipment or material with equipment or material acceptable to Operator.

(2) Contractor shall arrange for and secure all bits, coring equipment and coring supplies which are necessary for use in drilling such well, and any other items of equipment listed on Exhibit "B" attached hereto: but Contractor shall be reimbursed by Operator for the actual cost of such bits, wire line coring equipment, coring supplies and other items as provided in Section 7 hereof.

(3) Operator shall arrange for, secure and furnish at its own expense all items of equipment, materials and supplies listed on Exhibit "C" attached hereto.

(4) It is recognized by Contractor and Operator that various items of equipment, materials, and supplies in addition to those referred to in Exhibit "A", "B" and "C" may be required for drilling and completing or abandoning such well. In the event additional items are required, such items shall be arranged for, secured and paid for from to time as mutually agreed upon by Contractor and Operator.

Section 3—Labor

(1) Contractor shall arrange for and secure all labor reasonably necessary for drilling and completing or abandoning such well.

Operator shall reimburse Contractor for the costs of such labor in accordance with the provisions of Section 7 hereof.

(2) Operator shall arrange for, secure and furnish at its own expense any crews necessary for the operation of the converted LST to be furnished by Operator, for the boarding and lodging of employees of Contractor, Operator, and

third parties engaged in operations hereunder, and for the operation of any other vessels which may be furnished by Operator for use in the transportation of materials, equipment, supplies and labor.

Section 4—Water Transportation

Operator shall arrange for, secure and furnish, at its own expense, all vessels, including crew boats, tugs and barges, necessary for the transportation by water of all equipment (including Contractor's rig and appurtenances thereto), materials, supplies and labor necessary for drilling under this contract.

DEFENDANT'S 1(d)

Exhibit "C"

Items to be furnished by the Operator at its own expense under drilling contract for drilling Well No. A-2 and possibly other wells from the "A" platform on OCS-G-1572 lease in the South Timbalier Block 189 Field, Offshore Terrebonne Parish, Louisiana:

Drilling platform to support the drilling engines, pumps, drawworks, casing, and all other equipment necessary for drilling said well;

Converted LST to be used as drilling tender for quartering of crews and storage of necessary supplies and rig equipment;

One 140′ steel derrick, together with substructure;

Casing, casing shoes, and other necessary casing appliances;

Cement and cementing equipment and any necessary services of third parties for cementing casing, including any cement and equipment and service for any necessary recementing of casing, provided such recementing is not made necessary through negligence or fault of Contractor or its employees;

Mud and any other necessary weighting materials, it being understood and agreed that Operator shall have the right to specify the quality and type of mud and weighting materials to be used, and Contractor shall act in accordance with Operator's specifications. Contractor agrees to keep an orderly inventory of mud materials in order that an inventory may be made at any time and to keep an accurate record of mud deliveries and mud usage by tours;

Devices and services of third parties for surveys and tests;

Fuel and water for drilling;

Liner, tubing and necessary fittings for completion;

Necessary marine transportation between shore and well location for labor, equipment and supplies;

Mud pits with walks for gun lines, guard rails on platform, housing, and flooring on the platform;

Water tanks and fuel oil tanks, if necessary;

All necessary mud, water, gas and air lines up to the first deck of platform;

Additional set of casing tools is required by Operator;

Any additional completion equipment required for dual completion;

3½" or smaller diameter drill pipe, small drill collars and related equipment for drilling 7" casing;

Food, materials, supplies, and services to adequately provide for the boarding and lodging of employees of Contractor, Operator, and third parties engaged in operations hereunder.

INITIALED FOR:

Operator By E.J.C.
Contractor By C.P.

DEFENDANT'S 2

Boatel Catering CONTRACT & AMENDMENTS	Daily Minimum	No. of Lodgings and Meals	Charge Per Day for Excess Meals and Lodging	Contractor's Third Party Billing Figure
Contract 10-5-64	$224	30 Lodgings 90 Meals	$1.50	$1.75
Amendment Effective 1-1-65	N/C	33 Lodgings 99 Meals	N/C	N/C
Amendment Effective 7-1-66	$245	N/C	N/C	$2.00 per meal $1.50 per lodging
Amendment No. 2 Effective 2-1-67	$254	30 Lodgings 90 Meals	N/C	N/C
Amendment No. 3 Effective 4-16-67	Daily minimum reduced to $244 when complement exceeds 45 lodgings and 135 meals per day	N/C	N/C	$2.00 per meal $2.00 per lodging
Amendment No. 4 Effective 9-1-68	*$233 Deleted reduced rate referred to above.	N/C	N/C	N/C
Amendment No. 5 Effective 2-1-69		N/C	N/C	$2.50 per meal $2.50 per lodging

OFFSHORE OPERATING AND CATERING SERVICE AGREEMENT

THIS CONTRACT AND AGREEMENT, effective as of the 5th day of October, 1964, is hereby made and entered into by and between BOATEL, INC., a Louisiana Corporation, domiciled in and doing business at Belle Chasse, Louisiana, and ROWAN DRILLING COMPANY, INC., a Delaware Corporation, duly authorized to do business in the State and Area in which these operations are to be conducted:

WITNESSETH, THAT:

The parties hereto, for the considerations and obligations herein expressed, mutually agrees as follows:

1. Boatel, Inc. above named is hereinafter designated as "Contractor".
2. Rowan Drilling Company, Inc., is hereinafter designated as "Company".
3. The term "Owner" as used herein is defined as Continental Oil Company and any and all Co-lessees of Continental Oil Company who wholly or partially bear the cost of drilling operations wherein the Drilling Tender defined below is utilized, and the agents, directors, officers, employees, and servants of Continental Oil Company and the said Co-lessees.
4. The Drilling Tender Jack Cleverley bearing Official No. 269835 now under the control of Owner, is hereinafter referred to as the "Drilling Tender".

Contractor shall furnish to Company complete catering services and operating and manning services aboard the Drilling Tender as hereinafter set forth.

Section A

I

The catering service to be furnished by Contractor at Contractor's expense hereunder includes:

A. Maintaining a sufficient quantity of foodstuffs and supplies on the Drilling Tender to adequately feed and serve the personnel provided for in this contract for a period of five (5) days beyond the next scheduled delivery date, excepting perishables.

1. Contractor will purchase and use only meat and other products government inspected and/or graded as follows:

   a. All beef cuts U.S.D.A. Good, Choice or Prime.

   b. All pork products shall be purchased from Federally inspected establishments only.

   c. Milk shall be Grade "A" Pasteurized or Homogenized.

   d. Eggs shall be Grade "A" Large or Extra Large.

   e. Poultry shall be U.S. Grade "A" only.

   Contractor warrants without reservation that all meats served will be wholesome and of sufficient quantity to satisfy Company.

2. Contractor will provide the following specified hot meals:

   a. Breakfast—Choice of two fruit juices, eggs, one breakfast meat, choice of cold cereals, and one hot cereal.

   b. Lunch—One hot soup, two vegetables, choice of two entrees, one of which must be a solid meat, poultry, or fish item, hot rolls and bread, milk,

coffee and other beverage, and one pastry dessert item.

c. Dinner—Same as lunch, but repeating at the most only one of the lunch entrees.

d. Midnight Meal—Same as breakfast, but including additionally one solid meat or poultry item, one vegetable, one soup and one pastry dessert item.

3. Contractor shall have coffee available at all times and shall furnish one or more types of pastries or sweet rolls at least twice daily between meals.

4. Contractor further agrees that when the tender is to be pulled back from the rig during severe weather, Contractor will furnish such emergency rations, including fresh water, as may be necessary to feed five men for ten days on the rig. Contractor will provide suitable protective containers for such emergency rations.

B. An adequate number of its employees, qualified as cooks, and helpers, who will prepare and serve meals aboard the Drilling Tender to Company's employees, invitees, and licensees, including Company's contractors, sub-contractors and agents and their employees.

1. Contractor shall screen his catering employees provided for in this Section "A" in the manner stated below before allowing them to board the Drilling Tender.

a. Each such employee of Contractor, when first boarding the Drilling Tender and annually thereafter shall be required by Contractor to furnish Company's representative with a certificate of medical examination signed by a Doctor of Medicine. This certificate must evidence the following:

(1) Satisfactory vision and color sense.

(2) Normal blood pressure and pulse.

(3) Complete absence of hernias and varicose veins.

(4) Complete absence of communicable disease or epilepsy.

(5) Satisfactory report of chest X-rays, urine and Wasserman tests.

b. Such employees must be screened by Contractor for addicition to alcohol and drugs, criminal record and cleanliness of person.

2. Contractor shall promulgate such regulations as will guarantee courteous, efficient and safe performance under this contract and which must be submitted to Company for approval.

C. All sanitary supplies required on the Drilling Tender and employees necessary to maintain the kitchen, dining and living quarters in a neat condition.

D. All dining room utensils, which shall be of stainless steel; paper cups for coffee; silverware; plastic dishware; pots and pans; and all miscellaneous other necessary kitchen and dining room equipment and supplies not to be furnished by Company or Owner hereunder.

E. Two sheets with minimum dimensions of 63″ x 99″, a pillowcase, a blanket and a spread for each bunk, and towels. Contractor will change pillowcases and both sheets on each occupied bunk with clean linen not less than each crew change in time for incoming crew to have fresh linens. Contractor shall change towels, blankets and spreads as necessary to maintain freshness and cleanliness.

II

A. Owner has furnished, and will furnish, the galley equipment namely stoves, sinks, refrigerators; and will also furnish bunks, mattresses and pillows.

B. On the effective date of this contract, said galley equipment, etc., has been inspected by Contractor and found to be in good condition, and Contractor agrees to advise Owner of any repairs, maintenance or replacement of this equipment which may be required. Owner will make the necessary repairs or replacements of the equipment after receipt of notice from Contractor, at the expense of the Owner.

C. Contractor agrees that its supervisor, inspector or an officer of its company, shall physically inspect the catering operation at least once each month for compliance with this contract, and at the option of Company this inspection shall be made jointly with a representative of Company. Contractor will conduct a safety inspection of the galley, dining rooms and quarters at least semi-annually. Contractor will provide Company's onshore representative with the results of these inspections and will make such corrections as reasonably required by Company.

D. The Contractor's shore facilities for production, warehousing, packaging and processing of foodstuffs, whether owned or contracted for, shall be subject to Company's inspection at any time without notice.

III

Company will from time to time advise Contractor (a) the time it desires meals served on each day, and (b) an estimate of the number of persons to be fed at each meal.

IV

Contractor shall purchase at its expense the supplies required to furnish the catering service hereunder and do and perform the work herein set out as an independent contractor. Contractor has full power and authority to select the means, methods, and manner of performing the work, including the selection and employment of personnel to complete the work herein undertaken, being free of control of or supervision by Company, and is only responsible to Company for the results herein contracted for i.e., to keep kitchen, dining room and living quarters of the Drilling Tender in a neat and clean condition with adequate sanitary supplies and to secure the necessary food, prepare the meals and serve persons all as herein provided.

V

A. Owner will furnish all necessary water transportation from the shore base from which the Drilling Tender is being operated to the location of the Drilling Tender, and from the Drilling Tender to the shore base.

B. Owner will maintain a regular transportation schedule for replacement of stores at a frequency of at least twice a month, except for perishables which will be transported weekly.

C. Owner will maintain a regular transportation schedule for Contractor's employees on regular crew change days.

D. Contractor will package stores, for delivery to the Drilling Tender, in a manner to retain their then condition until delivered to the Drilling Tender.

E. Contractor will deliver said stores on board the vessel thirty minutes prior to estimated departure time.

F. Company will secure said stores as a precaution to protect same from damage caused by movement, other cargo and the elements.

VI

Company agrees that it will provide quarters on the Drilling Tender for Contractor's personnel equal to the quarters provided for employees of Company and employee of Company's other contractors and sub-contractors.

VII

Company agrees that it will pay to Contractor for the catering services herein contracted for as follows:

For the period from ——— and thereafter:

A. $224.00 minimum per 24 hour day for a maximum of 30 lodgings and 90 meals aboard the Drilling Tender for Company and Contractor personnel.

B. $1.50 for each meal and/or lodging over and above the amount indicated in "A" above.

C. Contractor reserves the right to invoice all third parties at $1.75 per unit.

D. Company will reimburse Contractor for actual labor costs, applicable to Contractor's personnel required by Section "A" of this agreement, in event said personnel are evacuated from the Drilling Tender due to storm and the daily rate above set out is suspended.

E. The actual cost to Contractor of foodstuffs lost or spoiled as the result of the evacuation of Contractor's personnel from the Drilling Tender because of weather.

Section B

I

A. To man the Drilling Tender, Contractor shall employ and pay for the services of a Master, who shall be subject to the exclusive direction, control and supervision of Contractor. The Master shall have and exercise full

control, responsibility and authority with respect to the operation, navigation and management of the Drilling Tender. In addition to the Master, Contractor shall procure and employ qualified men required to fill the complement of the crew for the Drilling Tender. The members of the crew, who shall also be the employees of Contractor, shall be subject only to the orders of the Master while they are under his control. Contractor shall remove Master or crew members at any time Company objects to the person so employed; the removal to be accomplished after a reasonable notice.

B. The crew required to be present aboard the Drilling Tender under this Section "B" shall consist of the following:

1. Master
2. Chief Engineer-Electrician
3. Two (2) Able-bodied Seamen
4. Two (2) Diesel Operators (each working twelve (12) hour daily tours).

C. Contractor must retain in his organization a full time Marine Supervisor for Deck & Engine Department, who carries a U.S. Coast Guard License no less than the following:

A. Third Mate—any tonnage, any ocean.

B. Assistant Engineer (Marine)

He shall be completely familiar with procedures in conducting hull, machinery and equipment inspections on this tender, including the filing of the necessary forms with authorities. Inspections shall be made not less often than once a month.

II

Contractor shall arrange for such emergency repairs as may be necessary to protect the Drilling Tender and for the normal operating repairs thereto, covering Hull, machinery, tackle, apparel, furniture, equipment and spare parts, and including maintenance and voyage repairs and replacements as may be necessary to keep the vessel safe for proper use and navigation. All repairs not normally done by the crew of a vessel (except emergency repairs) shall be made by Owner, unless Contractor is specifically requested by Owner to make such repair work and, in all such cases, the agreement for such repairs shall be evidenced by written contract. Replacement of all expendable parts for mud pump fluid ends, expendable parts for pulsation dampeners, all lubricants, oils and greases, all filters and hand tools shall be furnished by Company, except in situations where Company specifically directs Contractor in writing to procure same, in which event they will be procured by Contractor at Company's expense. Replacement of spare parts other than those described herein shall be furnished by Owner, except in situations where Owner specifically directs Contractor in writing to procure same, in which event they will be procured by Contractor at Owner's expense.

III

As compensation for the manning, maintenance and repairs of the Drilling Tender by Contractor, Company agrees to pay the following consideration:

A. $239.00 per 24 hour day, except as provided in "C" first below. This price includes absorption of normal overtime in excess of the regular working schedule. Company will reimburse Contractor to the extent of his actual labor costs for any amount of overtime worked during emergencies which require that Contractor's personnel work continuously during said emergencies and

provided the emergency is not caused by Contractor or its employees.

B. Company and/or Owner as the case may be agrees to reimburse Contractor to the extent of Contractor's actual cost for said replacement and spare parts when the total cost of said replacement and spare parts obtained at any one time is less than $1,000. When the cost of said replacement and spare parts obtained at any one time equals or exceeds $1,000 Company and/or Owner as the case may be will reimburse Contractor the actual cost of said parts plus 6%.

C. Company will reimburse Contractor for his actual labor costs, applicable to Contractor's personnel required by Section "B" of this agreement, in event said personnel are evacuated from the Drilling Tender due to storm and the daily rate above set out is suspended.

IV

Except as herein specifically provided, Contractor, as an independent contractor, has full power and authority to select the means, methods and manner of performing the work, including the selection and employment of personnel to man the vessel and complete the work herein undertaken, being free of control of or supervision by Company, and is only responsible to Company for the manning of the vessel, repair and maintenance of same. Owner shall have the power and authority to designate when and where the Drilling Tender is to be moved at all times.

Section C

I

Contractor will submit a list of the names and job titles of all Contractor's personnel to Company's representative upon boarding the Drilling Tender. Contractor will revise said list as necessary to keep Company's representative

currently apprised of the identity of all Contractor's personnel on board the Drilling Tender at any time.

II

Contractor will maintain a daily work and crew change schedule consistent with that established by Company for the area.

Section D

I

A. To eliminate controversies, the expense and inconvenience thereof, as between Company, Contractor, and Owner, it is agreed by Company and Contractor as follows:

1. All parties named reserve the right to recovery for breach of contract.

2. The products liability insurance coverage (Provided in Exhibit "A", Paragraph "B" 3) is for the protection of Contractor and for the benefit of all parties concerned including the underwriters, insurers, insurance carriers of each.

3. Except as to Items 1 and 2 above, the Company and Contractor and the underwriters, insurers, insurance carriers of each with respect to this contract shall not have any rights of recovery (equitable or by assignment, express or implied, loan receipt or otherwise) against any of the parties hereto and/or Owner, their agents, directors, officers, employees and servants, or against their respective property, vessels and craft, or underwriters, insurers, and insurance carriers of the parties hereto, their agents, directors, officers, employees and servants and the rights of recovery with respect to this obligation are mutually waived. All policies of insurance herein provided and obtained or required by either party

shall be suitably endorsed to effectuate this waiver of recovery. Certificates of all policies of insurance herein provided and obtained shall be furnished by Contractor to Company and by Company to Contractor with no certificates of insurance to be materially changed or cancelled without at least ten (10) days prior written notice to said Insurance Department of Company.

B. Except with respect to claims or causes of action arising from the comsumption of food or beverages by employees of Company and Owner, Company agrees to indemnify and hold harmless Contractor and their Underwriters and any or all agents, directors, officers, employees or servants of Contractor against any and all claims, demands or suits (including, but not limited to claims, demands or suits for bodily injury, illness, disease, death, or loss of services, property or wages) which may be brought against Contractor or in which they are named a party defendant or in which any or all such agents, directors, officers, employees or servants of Contractor are named party defendant or parties defendant, as the case may be, by an employee of Company or Owner or the legal representative or successor of such employee, in any wise arising out of or incident to the work to be performed under this contract, irrespective or whether such suits are based on the relation of Master and Servant, third party or otherwise and even though occasioned, brought about, or caused in whole or in part by the negligence of Contractor, their agents employees, or by the unseaworthiness of vessel or craft. Company and its underwriters further agree to defend any such claim, demand, or suit even if it is groundless, false, or fraudulent; but Company and its underwriters may make such investigations, negotiations and settlement of any such claim, demand, or suit as it deems expedient.

C. Contractor agrees to indemnify and hold harmless Company, Owner and/or Underwriters insuring the Drilling Tender, and any or all agents, directors, officers, employees or servants of Company and Owner against any and all claims, demands or suits (including, but not limited to, claims, demands or suits for bodily injury, illness, disease, death, or loss of services, property or wages) which may be brought against Company and/or Owner or in which they or either of them is named a party defendant or in which any or all such agents, directors, officers, employees or servants of Company and/or Owner are named party defendant or parties defendant, as the case may be, by an employee of Contractor or the legal representative or successor of such employee, in any wise arising out of or incident to the work to be performed under this contract, irrespective of whether such suits are based on the relation of Master and Servant, third party or otherwise and even though occasioned, brought about, or caused in whole or in part by the negligence of Company and/or Owner, their agents, employee, or by the unseaworthiness of vessel or craft. Any employee who received payment from Contractor shall be the employee of Contractor, even though Company and Owner reimburses Contractor the amount paid such employee. Contractor further agrees to investigate, handle, respond to, provide defense for and defend any such claim, demand or suit at its sole expense and agrees to bear all other costs and expenses related thereto, even if it is groundless, false, or fraudulent; but Contractor may make such investigation, negotiation and settlement of any such claim, demand, or suit as it deems expedient.

D. Except to the extent products liability insurance may be for the protection of all claims and liabilities arising within the scope of its coverage, Owner (Owner agreeing by its ratification of this contract) agrees to indemnify and hold harmless Contractor, and any or all

agents, directors, officers, employees or servants of Contractor, against any and all claims, demands, or suits (including, but not limited to, claims, demands, or suits for bodily injury, illness, disease, death, or loss of services, property or wages) which may be brought against Contractor or in which Contractor is named a party defendant or in which any or all such agents, directors, officers, employees or servants of Contractor are named party defendant or parties defendant as the case may be, by any employee of owner or the legal representative or successor of such employee, in any wise arising out of or incident to the work to be performed under this contract, irrespective of whether such suits are based on the relationship of Master and Servant, third party or otherwise and even though occasioned, brought about, or caused in whole or in party by the negligence of Contractor, its agents, employees, or by the unseaworthiness of vessels or crafts. Owner further agrees to investigate, handle, respond to, provide defense for and defend any such claim, demand or suit at its sole expense and agrees to bear all other costs and expenses related thereto, even if it is groundless, false, or fraudulent; but Owner may make such investigation, negotiation and settlement of any claim, demand, or suit as it deems expedient.

E. Contractor agrees to protect, indemnify, defend and save Company, Owner, and/or Underwriters insuring the Drilling Tender, harmless from and against all claims, demands and causes of action of every kind and character arising in favor of any person or persons, including agents and employees of Contractor, on account of bodily injury, sickness or disease, including death, resulting from the consumption of food and beverages prepared by Contractor and partaken of on the Drilling Tender.

F. Each party shall notify the employer immediately of any claim, demand, or suit that may be presented to it

by an employee of such party, affording such other party full opportunity to assume the defense of such claim, demand, or suit and to protect itself under the obligation of this article.

G. Subject to the right of Company to cancel this agreement upon seven (7) days' notice, this contract shall be for a primary term of one (1) year. Unless previously cancelled, it shall be automatically renewed for successive periods of one (1) year, cancellable as above provided.

II

Contractor shall procure and maintain, at his expense, policies of insurance as set out in Exhibit "A" attached to and forming a part of this agreement. Policies shall be written by insurance companies and on policy forms approved by the Company and Contractor shall furnish to Company prior to commencement of operations certificates of insurance on Company forms listing all policies required under the agreement.

III

Owner shall name Contractor and Company as additional assured on Protection and Indemnity Insurance carried by Owner on the Drilling Tender. Owner hereby assumes all risks covered by an American Institute Time Hull Form and Owner has the option of either insuring or self-insuring such risks.

IV

Neither party shall have any liability to the other with respect to any damage proximately caused by any labor strike dispute or stoppage to work, lockout, shortage of materials, any Act of God, peril of the sea or any other cause beyond the control of such party.

IN TESTIMONY WHEREOF, this contract has been executed this 27th day of August, 1964.

WITNESSES:

/s/ PATRICIA L. CROWLEY

/s/ JACKIE MIGLIORE
P.L.E.
R.N.

RATIFIED AND APPROVED:

BOATEL, INCORPORATED

/s/ By: JOHN P. KUCHTA
John P. Kuchta, President

/s/ By: M.S.R.

/s/ By: ILLEGIBLE

Exhibit "A"

A. Workmen's Compensation, Employer's Liability and Occupational Disease insurance covering all employees engaged in work to be performed under this agreement, including:

1. Coverage to comply with the workmen's compensation and occupational disease laws of the State of Louisiana and other states as required.
2. Coverage under the United States Longshoremen's and Harbor Worker's Compensation Act and the Outer Continental Shelf Lands Act.
3. Additional medical coverage of $10,000.00.
4. An employer's liability limit of not less than $500,000.00 any one person.
5. Coverage for claims under the Jones Act, or any other Maritime Law, with limits of not less than $100,000 for one employee and $300,000 for one accident.
6. That a claim "In Rem" shall be treated as a claim against the employer.

B. Comprehensive General Liability Insurance, including:

1. Bodily Injury:
   $100,000 each person
   $500,000 each accident
2. Property Damage:
   $100,000 each accident
3. Coverage for liability resulting from the consumption of food prepared or served by Contractor.
4. Coverage for all contractual liability assumed by Contractor under the terms of this agreement.
5. Coverage in the Gulf of Mexico beyond the territorial limits of the United States.
6. A provision that a claim "In Rem" shall be treated as a claim "In Personam".

C. Automobile Liability Insurance to cover all automobiles or trucks used in operations under this Agreement, including:

1. Bodily Injury:
   $100,000 each person
   $500,000 each accident.

2. Property Damage:
   $50,000 each accident.

Offshore Operating and Catering Service Agreement

DRILLING TENDER JACK CLEVERLEY—AMENDMENT NO. 1 CONTRACT BETWEEN ROWAN DRILLING CO., INC. AND BOATEL, INC DATED .....

Under Section B, III, insert the following paragraph D.

D. Contractor is hereby authorized to charge Company for overtime hours worked for Company by Contractor's Chief Engineer, other than during normally scheduled work hours. Such work must be performed at the express request of Company's Foreman at the well site. The rate per hour for such overtime work shall be $4.22. Payments made for any such overtime charges shall be in addition to the compensation set out in this Agreement.

WITNESS:

/s/ PATRICIA L. CROWLEY

/s/ JACKIE MIGLIORE

RATIFIED AND APPROVED:

ROWAN DRILLING COMPANY, INC.

/s/ By:

President

BOATEL, INCORPORATED

/s/ By: JOHN P. KUCHTA
John P. Kuchta, President

BOATEL
INCORPORATED
OIL FIELD CONTRACTORS
January 12, 1965

FOrest 6-1585
Belle Chasse Highway
Belle Chasse, Louisiana

Mailing Address
Post Office Box 37
Gretna, Louisiana

Rowan Drilling Company, Inc.
600 Saratoga Building
New Orleans, Louisiana 70112

Attention: Mr. Cliff W. Yancey, Vice President

RE: OFF-SHORE OPERATING AND CATERING SERVICE AGREEMENT DATED OCTOBER 5, 1964

Gentlemen:

It is agreed that subject contract will be revised to read as follows:

> Page 4, Paragraph VII, Item A—$224.00 minimum per 24 hour day for a maximum of 33 lodgings and 99 meals aboard the Drilling Tender for company and contractor personnel.

If you are in accord with this amendment, please execute one copy and return to the undersigned for our files.

Respectfully,

BOATEL, INCORPORATED
/s/ JOHN P. KUCHTA
John P. Kuchta
President

JPK/jte

AGREED TO: ROWAN DRILLING COMPANY, INC.

/s/ By CLIFF W. YANCEY
Cliff W. Yancey, Vice President

DATE:

This amendment will be effective as of January 1, 1965.

June 23, 1966

Rowan Drilling Company, Inc.
600 Saratoga Building
New Orleans, Louisiana

Attention: Mr. C. W. Yancey
Vice President

RE: D/T JACK CLEVERLEY
OFFSHORE OPERATING & CATERING AGREEMENT
Dated October 5, 1964

Gentlement:

It is agreed that the catering portion of subject contract which is Items A, B and C of Page 4 be modified to read as follows and also nullify the verbal agreement relative to the $259.00 day rate:

A. $245.00 minimum per 24 hour day for a maximum of 33 lodgings and 99 meals aboard the drilling tender for Company and Contractor's personnel.

B. The sum of $1.50 per each meal and/or lodging over and above the amount indicated in "A" above.

C. Contractor reserves the right to invoice all third parties at $2.00 per meal and $1.50 per lodging.

This action will be effective July 1, 1966.

If you are in accord with the above, please execute one (1) copy and return to this office for our files.

Respectfully,

BOATEL, INCORPORATED

/s/ JOHN P. KUCHTA
John P. Kuchta, President

AGREED TO:

ROWAN DRILLING COMPANY, INC.
By: C. W. YANCEY

January 23, 1967

Rowan Drilling Company, Inc.
600 Saratoga Building
New Orleans, Louisiana 70112

RE: D/T JACK CLEVERLEY
CATERING AGREEMENT DATED OCTOBER 5, 1964
AMENDMENT LETTER DATED JUNE 23, 1966
AMENDMENT No. 2

Attention: Mr. C. W. Yancey
Vice President

Dear Sir:

Based on my letter of January 18, 1967 and discussions thereafter, it is agreed that Page 4, Paragraph A of subject Contract to be amended to read as follows:

AMENDMENT No. 2—EFFECTIVE FEBRUARY 1, 1967
Page 4, Paragraph A

A. $254.00 minimum per 24 hours for a maximum of 30 lodgings and 90 meals aboard the Drilling Tender for Company and Contractor's personnel.

If you are in accord with the above, please execute one copy and return to this office for our files.

Respectfully,

BOATEL, INCORPORATED

/s/ JOHN P. KUCHTA
John P. Kuchta
President

ACCEPTED BY:

ROWAN DRILLING COMPANY, INC.

By /s/ C. W. YANCEY
C. W. Yancey
Vice President
DATE: 1-27-67

JPK/jl

April 14, 1967

Rowan Drilling Company, Inc.
600 Saratoga Building
New Orleans, Louisiana 70112

Attention: Mr. C. W. Yancey
Vice President

RE: D/T JACK CLEVERLY
CATERING AGREEMENT DATED OCTOBER 5, 1964
AMENDMENT LETTERS DATED JUNE 23, 1966
AND JANUARY 23, 1967

Dear Sir:

Based on our discussion of this date it is agreed that the following considerations and/or amendments will be a part of subject contract:

In consideration of raising the minimum wage to $1.75 per hour, Boatel, Inc. will reduce the existing crew based on 5-5-4 to 4-4-4. Wages for Boatel crew are as follows:

Title	Rate Per Hour
Steward	$2.15
Relief Steward	2.05
Night Cook & Baker	1.95
Utility Man	1.75

It is understood that the on board galley complement of 4-4-4 would apply when feeling in the vicinitcy of thirty (*30*) people. When feeding operations increase to forty-five (*45*) people on board, it is understood Boatel, Inc., will increase their crew to a 5-5-5. Expense of this increase would be derived from the third party billing.

AMENDMENT No 3—EFFECTIVE APRIL 16, 1967

Page 4, Paragraph A to remain the same but re-typed for conformity.

A. *$254.00* minimum per 24 hours for a maximum of *30* lodgings and *90* meals aboard the Drilling Tender for Company and Contractor's personnel.

Page 4, Paragraph A-1 to be inserted as follows:

A-1. When feeding complement exceeds *45* lodgings and *135* meals per calendar day, the day rate indicated in Paragraph A would be reduced to *$244.00*.

Page 4, Paragraph B to remain the same but re-typed for conformity.

B. The sum of *$1.50* per each meal and/or lodging over and above the amount indicated in "A" above.

Page 4, Paragraph C to be amended as follows:

C. Contractor reserves the right to invoice all third parties at *$2.00* per meal and *$2.00* per lodging.

If you are in accord, please execute one copy and return to this office for our files.

Respectfully,

BOATEL, INCORPORATED

/s/ JOHN P. KUCHTA
John P. Kuchta
President

ACCEPTED BY:

ROWAN DRILLING COMPANY, INC.

C. W. Yancey
Vice President

BOATEL
OIL FIELD CONTRACTORS

Phone: 366-1585
Belle Chasse Highway
Belle Chasse, Louisiana

September 3, 1968
Received September 4, 1968
New Orleans

Rowan Drilling Company
600 Saratoga Building
New Orleans, Louisiana 70112

Attention: Mr. C. W. Yancey,
Vice President

REFERENCE: D/T JACK CLEVERLY—
CATERING AGREEMENT DATED OCTOBER 5, 1964—
AMENDMENT NUMBER 4

Gentlemen:

Relative to subject contract, it is agreed the following will be amended effective September 1, 1968.

Page 4, Paragraph "A" to read:

A. $233.00 minimum per 24 hours for a maximum of *30* lodgings and *90* meals aboard the Drilling Tender for Company and Contractor's personnel.

Page 4, Paragraph "A-1" to read:

A-1. Deleted.

Page 4, Paragraph "B" to remain the same but re-type for conformity.

B. The sum of $1.50 per each meal and/or lodging over and above the amount indicated in "A" above.

Page 4, Paragraph "C" to read:

C. Contractor reserves the right to invoice all Third Parties at a minimum of $2.00 per meal and $2.00 per lodging.

If you are in accord, please execute one (1) copy and return to this office for our files.

ACCEPTED BY:

ROWAN DRILLING COMPANY, INC.

/s/ C. W. YANCEY
C. W. Yancey
Vice President

Respectfully,

BOATEL, INCORPORATED

/s/ J. P. KUCHTA

/s/ J. P. KUCHTA
President

CATERING AGREEMENT DATED OCTOBER 5, 1964,
BETWEEN BOATEL, INCORPORATED, AND
ROWAN DRILLING COMPANY, INCORPORATED
AMENDMENT NUMBER 5—D/T JACK CLEVERLY

Effective February 1, 1969, Page 4, Paragraph 7, Items A, B, and C to read as follows:

A. *$233.00* minimum per *24* hour day for a maximum of *30* lodgings and *90* meals aboard the drilling tender for Company and Contractor's personnel.

B. *$1.50* per meal and *$1.50* per lodging over and above the amount indicated in "A" above.

C. Contractor reserves the right to invoice all Third Parties at *$2.50* per unit.

All other basic stipulations of the contract to remain the same.

If you are in accord, please execute one copy and return to this office for our files.

ACCEPTED BY:

ROWAN DRILLING COMPANY, INCORPORATED

/s/ C. W. YANCEY
C. W. Yancey, Vice President—
Division Superintendent

BOATEL, INCORPORATED

/s/ JOHN P. KUCHTA
John P. Kuchta, President

[1] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Acton No. 75-H-1818

ROWAN COMPANIES, INC.,

v.

UNITED STATES OF AMERICA

Filed March 24, 1977

ANSWERS AND DEPOSITION OF C. W. YEARGAIN, produced as a witness at the instance of the Defendant, taken in the above-styled and numbered cause on the 14th day of October, A.D., 1976, at 2:00 o'clock p.m., before Wayne Hutson, a Notary Public in and for Harris County, Texas, at the offices of Rowan Companies, Inc., located at 1820 South Post Oak Tower, in the City of Houston, County of Harris, State of Texas, in accordance with the Agreement hereinafter set forth.

[2] APPEARANCES:

For the Plaintiff:
ELMER H. THEIS, Esq.
730 Dresser Tower,
Houston, Texas 77002

For the Defendant:
JOE W. BURKETT, Esq.
Attorney, Tax Division,
Department of Justice,
Room 8B37,
1100 Commerce Street,
Dallas, Texas 75242

[3]

AGREEMENT

It is hereby agreed, by and between the parties hereto, through their attorneys appearing herein, that any and all objections to any question or answer herein, either as to form or substance, may be made upon the offering of this deposition in evidence upon the trial of this cause with the same force and effect as though the witness were present in person and testifying from the witness stand.

It is further agreed by and between the parties hereto, through their attorneys appearing herein, that this deposition may be signed before any Notary Public in and for the State of Texas, at any time before or during the trial, and thereafter returned into Court and used on the trial of this cause with the same force and effect as though all requirements of the rules and statutes with reference to signature and return had been fully complied with.

[4]

C. W. Yeargain

the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BURKETT:

Q. Would you state your full name, please, sir.
A. C. W. Yeargain.

Q. Where do you reside?
A. In Houston.

Q. What is your age?
A. Fifty.

Q. Are you familiar with Rowan Companies, Inc.?
A. Yeah.

Q. Are you currently associated with Rowan Companies?

A. Yes.

Q. In what capacity?

A. Vice President.

Q. Were you associated with Rowan Companies during the period 1967 through 1969?

A. Yeah, sure was.

Q. In what capacity?

A. Oh, I don't know. I guess I was tool pusher at that time.

Q. What would that position involve?

[5] A. Looking after drilling rigs.

Q. What area were you—Were you in the Gulf operations?

A. I was on the Gulf Coast at that time, yes.

Q. In your work with Rowan during the period '67 through '69, were you performing services on offshore drilling rigs?

A. Some. Primarily I was on swamp barges. Some, yes.

Q. When did you first become associated with Rowan?

A. 1947.

Q. In what capacity were you asscociated with them?

A. Roughneck.

Q. Were you operating out of Houston during the years '67 through '69?

A. Not as far as I was concerned, no.

Q. New Orleans?

A. Yes.

Q. Were you in charge of drilling crews during that period?

A. Yes, as a tool pusher, I was in charge of crews on a specific rig.

Q. How many tool pushers would be on a rig?
A. One at a time, then.

Q. If someone wanted to begin work with Rowan as a [6] member of a drilling crew, how would they go about it?
A. You mean then or now?

Q. Then.
A. Well, we'd have to have a need for somebody before we needed it, and then either the driller or toolpusher would interview the people.

Q. Unless I specify otherwise, the period I'm talking about is the beginning of 1967 through the end of 1969.

During that period, you've mentioned that you, on occasion, would be toolpusher on offshore rigs in the Gulf?
A. Oh, I never did push on an offshore rig in the Gulf.

Q. Did you work on an offshore rig?
A. Yes.

Q. In what capacity?
A. Helping rig up.

Q. What do you mean by that?
A. Well, a new rig we'd send out on a platform, things like that.

Q. Setting up the rig?
A. As a new unit. I did a lot of work rigging up new units on land.

Q. Would you have been working with that rig after [7] it was set up?
A. A short while.

Q. How many people would be involved in rigging it up?
A. It would vary, depending on the stage, anywhere from six to maybe fifteen, twenty.

Q. What would be the hours you would work when you were there?

A. Me or the crew?

Q. Both.

A. Well, of course, I worked whatever needed to be done.

The crews' hours were twelve hours on and twelve off.

Q. Would that begin, usually, at midnight or would it begin at 6:00?

A. It depended on what rig. Sometimes it was 6:00 and 6:00, and sometimes it was 12:00 and 12:00.

Q. How many days would you be offshore during——

A. Personally, or the crew?

Q. Both.

A. Well, there's a lot of difference.

I have spent as many as ninety days offshore. The crews—At that time, I believe their time was 10 and 5, 10 out and 5 in.

[8] Q. You were not involved in tool pushing on the offshore rigs?

A. Not as such, no.

Q. What would the crew do? What would its duties involve in a normal work day after the rig had been set up?

A. Operate the rig to drill a hole in the ground.

Q. And what type activities does that involve?

A. Well, are you speaking of a Tender or platform or what?

Q. I'm not really sure.

A. Well, primarily, the drilling crews have to do with running the drilling rig, to drill the hole in the ground,

making the pipe go in the hole and come out of the hole, looking after the equipment, things like that.

Q. What type of activities, though, on a daily matter would be involved in undertaking that drilling?

A. Well, manual labor, primarily.

Q. But I mean were there particular type of functions that were involved? I mean would somebody have one particular type of duty?

A. Well, the driller primarily ran the drilling rig. The engine man looked after the engines.

Q. Were meals served regularly, by that, at specified hours, times?

[9] A. Normally, yes.

Q. As a general matter, what time would those meals be served?

A. 12:00, 12:00; 6:00 and 6:00.

MR. MAGNER: Can I speak?

MR. BURKETT: Yes.

MR. MAGNER: Are meals served—You're referring to an offshore operation?

MR. BURKETT: Yes, sir.

MR. MAGNER: Of the type that Mr. Yeargain would regard as one in which meals are served, you have not defined with him the question——

MR. BURKETT: Well, I think he and I, if I'm understanding him correctly, and he's understanding me correctly—we're talking about the offshore-type operation during the years '67 through '69.

THE WITNESS: Our offshore operation?

MR. BURKETT: Correct.

By Mr. Burkett:

Q. And that would involve a drilling platform and an L.S.T. and the Tender as a general matter—Well, excuse me. During the years '67 through '69, the offshore operations with which Rowan was involved would involve some type of platform for drilling and an L.S.T. Tender; is that correct?

[10] A. Yes.

It wouldn't have been an L.S.T., but it would have been a Tender, Tender platform arrangement.

Q. What is a Tender?

A. It's a dumb barge.

Q. And when you say dumb barge, could you explain what you mean by that?

A. No propulsion, ship shape with no means of propulsion of its own.

Mr. Magner: I referenced before the L.S.T.-type, so you can understand it.

Mr. Burkett: All right.

By Mr. Burkett:

Q. What facilities were there on the dumb barge?

A. What do you mean?

Q. I mean were there rooms?

A. Yes.

Q. Could you describe what one of the rooms might be like?

A. Well, we had one room that had the pumping equipment in it. We had rooms that had generators in them, rooms for storage of equipment and this type thing.

Q. Could you describe—Were there rooms on the dumb barges for persons to sleep?

A. Such as living quarters?

[11] Q. Yes, sir.
A. Yes. Uh-huh.

Q. Could you describe what those were like?
A. Well, they were just rooms with beds in them for—air conditioned, double bunks in some.

Well, I guess double bunks in all of them.

Q. Would that generally allow for one crew member to be using the room while his roommate was working and vice versa?
A. Yes.

Q. So that alternating shifts would be using one set of quarters?
A. Yes.

They didn't sleep in the same bed, now.

Q. No. I mean but they wouldn't—Even though they were not sleeping in the same bed, they wouldn't be in the room at the same time, generally? Would that be correct?
A. Well, depending on how many people—Normally, that's normally the general practice we tried to follow, yes.

Q. What other type furniture would be in one of these rooms?
A. Desk, chair, closet.

Q. What recreational facilities were available?
[12] A. Well, let's see, in 1967, they had a music room for guitar, radio, and I'm not too sure whether we had television on it then or not. That's been a long time ago.

They had books to read, trade magazines, whatever.

Q. What different type of trade publications would there be?
A. Primarily those associated with our industry.

Q. I mean what different associations would be involved?

A. I don't know what you mean.

Q. Well, who would put out the trade magazines?

A. Well, Gulf Publishing Company primarily published most of the trade magazines, I suppose.

Q. Would one of these, for example, be the I.A.D.C. publication or A.D.C. at that time?

A. Well, I suppose we might have had some of those out there.

Q. Who else would be the publishers?

A. Well, primarily like the Oil & Gas Journal and things like this.

Q. Were—To your knowledge, were any of the people involved in drilling during the years '67 through '69, drilling crew members? Were there unions along the Gulf Coast?

[13] A. Sure there were unions along the Gulf Coast at that time, but I don't remember of any organized drilling contractors.

Q. Were there any members of drilling crews who—Well, what I'm trying to find out, were there any unions to which members of drilling crews would belong along the Gulf Coast during the years '67 through '69, associated with drilling?

A. As far as I know, not associated with drilling. I'm sure some of them belonged to unions of other things.

I was speaking of our company. We were not unionized, and we are still not unionized.

Q. Were any of the drilling contractors?

A. Not any of the offshore contractors that I know of.

Q. Were there any other organizations that drilling crew members would be members of?

A. Such as?

Q. I don't know.

A. They could be members of all sorts of organizations.

Q. Well, associated with their activities as drilling crews.

A. No, not that I know of.

Q. Did members of drilling crews continue to work with one company at that time, or did they go from one [14] company—one contractor to another?

A. Well, as a rule, drilling crews sort of migrate, one to the other. Some companies keep them longer than others, but I guess as a rule, they sort of drift around, depending on the level of employment.

Q. When a man signs up or—How does a man become a member of a drilling crew? Does he sign up something or does he just do it by word of mouth or——

A. Well, first of all, you've got to need somebody, and then people who are looking for jobs, you talk to them and single out the ones that you think would best fit your need, bring him in and talk to him some more and give him a physical and send him to work, provided he passes the physical.

Q. When you talk to someone—Assuming he could pass the physical, when you talk to him, what would he be told with respect to the drilling activities?

A. Well, most people you talk to know what the Hell they're going to do. They just want to know if you need a roughneck.

Q. How would he know what he was going to get paid?

A. Well, he might not. He'd ask you.

Q. And would he ask you, for example, if you were there?

A. If I were talking to him at that time he would, [15] yes.

Q. And how would you know what he was going to be paid?

A. Well, we publish our pay scale within the Company, what people make.

Q. Was it pretty competitive within the industry?

A. Yes.

Q. During the time that we're talking about, would the pay be pretty much the same from one company to the next?

A. Fairly close. It wouldn't vary too much from company to company. Couldn't vary very much; one company would have all the hands.

Q. How was food supplied to the drilling rig while you were out there? Was it flown in? Did a boat bring it?

A. It varied. Normally it would be sent in on a boat.

Q. About how often would that be?

A. Depending on what kind of foodstuffs you're talking about and how far out the drilling rig was, once a week.

Q. What type foodstuffs would the boat bring?

A. Whatever you'd eat. Everything had to be brought out.

Q. Could you tell me some examples of what you're [16] talking about?

A. Well, like steak, milk, bread, stuff to make pastries with, eggs, bacon.

Q. How many cooks were on a Tender?

A. Well, you mean actual cooks?

Q. Or cooks and cooks' assistants.

A. Well, I believe most of the time you would find two cooks and a baker.

Q. If a cook wasn't very capable, would he stay on a Tender very long?

A. Well, he wouldn't stay on one of ours very long.

Q. Did the drilling crew have some say if a cook wasn't performing his functions as well as they might like?

A. Well, of course, they had some say, but the drilling crews didn't hire the cook, but our concern was to be sure that the crews were well fed and nourishingly fed so they would be able to do a lot of hard, manual labor.

Q. If you're out there with a crew for ten days, at any time is it fairly significant or important to have someone who's capable to do those functions, the cooks' functions, to have somebody who can do that pretty well? Is that important to the morale of the people?

A. You're God damned right.

Q. Is is fair, then, to say that the people out [17] there eat pretty well?

A. Well, they can. They don't have to.

Q. But I mean the food is pretty good out there?

A. The food that is offered to them is damned good. They don't have to eat it if they don't want to.

Q. Is there any place else to eat?

A. You can go to the bank, if you can find a ride.

Q. Are rides available?

A. Not for every meal, but there are rides available.

Q. It's pretty infrequently?

A. Depends on where it's located.

Q. Say you've got a rig thirty miles offshore.

A. Well, thirty miles offshore—How far from the landing, that's the thing. If it's thirty miles from the landing, transportation is readily available.

Q. Rarely?

A. Readily, normally.

Q. For going to get meals?

A. Nobody goes and gets meals. Why go get a meal; they eat out there.

But I guess if someone wanted to go get it he could get after it.

Q. How long would it take to get back to that landing?
[18] A. Thirty miles would probably take two hours to go in.

Q. And two hours to get back?
A. And two hours to get back.

Q. If he was on a crew that started at twelve midnight and got off at twelve noon, would it be unlikely that he would take a boat to get that meal?
A. Well, I don't know of anybody that did, but the possibility exists, if he didn't like what we fed him.

Q. How far would it be from the landing to someplace where he might get a meal?
A. It might be a quarter of a mile, or it might be fifty miles.

Q. Were persons available to keep the quarters clean?
A. Yes.

Q. The actual activity involved in drilling, the manual labor, could you describe what it involved in that?
A. Well, what do you mean?

Q. What does a member of the drilling crew do out there during his shift?
A. Well, a lot depends on which member you're talking about. The driller runs the show, runs the draw works.

[19] What's the draw works?
A. The thing that pulls the piping in and out of the hole.

Q. Yes, sir.
A. And the floormen make up primarily the drill string as they go in and go out of the hole.

Q. Drill string, is that—What do you mean by drill string?
A. The thing that turns the bit. The bit is fastened to the end of it.

Q. What other persons would there be?

A. Well, the derrickman that works up in the derrick when they're making a trip to stack all that stuff back in the derrick; the engine man to look after the engine; crane operator, where there was a crane, to run the crane; a pumpman to look after the pumps; and a mud man to look after the mud.

Q. How often would bits have to be changed?

A. Well, it varied. It might run two hours; it might run two days.

Q. Were these platforms fixed, immobile, where they couldn't move?

A. Well, it depends on what you call moving. Now, they were—The Tender platforms were affixed to the bottom by piling. But, you know, there's a little motion.

[20] Did they ever break their moorings?

A. The platforms were not moved, so they didn't break their moorings.

Q. Was it possible to—What was the terminology you used for the line that has the bit on the end of it?

A. Drill string.

Q. Drill string.

Did they ever break?

A. Oh, once in a while.

Q. What would be the circumstances where that might happen?

A. Well, you might be drilling and just have a fatigue break.

Q. What would you do?

A. Fish it out.

Q. Was the drilling continuous except for, say, change in bits?

A. Well, the drilling operation, as such, yes.

Q. How many people does it take to operate a drill string, to keep it going up and down or rotating or whatever?

A. Well, just rotating it, the driller could control that, as long as he's got power.

Q. Would that continue around the clock?

A. The drilling operations, yes, as such, that's [21] either drilling or making a trip or fishing.

Q. Did they shut down at any regular times?

A. No.

Q. The driller could see that the bit, itself, was rotating? I mean is that one individual that could do that?

A. I mean he could tell if the drill string was rotating, yes.

Q. That's a mechanical function that he could oversee?

A. He could look at it.

Q. How many drillers in a crew?

A. One with that title.

Q. As an average matter, how many members would there be to a crew?

A. On the platform, five to six.

Q. That would be the toolpusher, the driller?

A. On the platform, it would be the driller, engineman, derrick man, two floormen, maybe three.

Q. When a meal was served, did people on the platform stagger when they would eat?

A. Normally, yes.

Q. Then everybody——

A. Now, that's just one meal, now, the meal in the middle of their shift. The other two meals they were off.

[22] And the meal in the middle of their shift, part of the people would be eating and part of the people would be working?

A. Uh-huh.

Q. And then they would change around, and the other persons would eat and the one who had already eaten would continue working?

A. That's right.

Q. How many people are involved in changing a bit?

A. Five to six.

Q. Can one or two people change a bit?

A. Yes, but it would take a Hell of a long time.

Q. What would happen if the—What would happen if a—Was it the string line? Was that the term?

A. Drill string.

Q. If a drill string broke, how many people would be involved in fixing that?

A. The same amount.

Q. It would pretty much take the whole crew?

A. Five or six.

Q. And that would be a whole crew?

A. On a platform.

Q. Yes, sir.

What would determine when a drill bit needed to be changed?

[23] A. Well, a lot of things; one thing if it was worn out. And that's more or less a judgment call.

Q. Who would make that judgment?

A. It might be the driller, toolpusher, company man, directional driller. It all depends.

Q. How would he let the other persons know that it had to be changed?

A. Well, depends on who it was. If it was the company man, he'd tell the driller to pull the bit. The driller would tell all them others "Gather around. Let's go."

Q. Would that take priority over any other activities?

A. Such as?

Q. Anything else. If the bit needed to be changed, is that what got done first?

A. Well, normally, yes. Other things can go on while that's being done, but that's the purpose of the rig is to drill a hole in the ground.

Q. What kind of things would keep the drill bit from being changed once it needed to be changed? Say the driller decided it needed to be changed, would somebody just say, "Hold it"?

A. No.

If he had power and everything was running, "Well, here we go."

[24] Q. It would get changed right then?

A. Start on it.

Q. And would the activity continue until the drill bit got changed?

A. Yes.

Q. Until the—I keep losing the terminology, the drill——

A. Drill string.

Q. Drill string.

Until that was back at work again?

A. Yes.

Q. And would that pretty much be the case any time?

A. Yes.

Q. Who was in charge of the drilling crew?

A. Of a drilling crew?

On the platform, it would be the driller.

Q. If a driller told someone to help change the bit, were they pretty much going to have to help change the bit?

A. If they want to work.

Q. In other words, they weren't going to be there very much—very long if they——

A. Well, unless there's something physically wrong with them or something like that or he had to go eat or something like that.

[25] Q. If he wanted to go eat, he could say, "Hold the phone. We're not going to change the drill bit"?

A. That's not necessary. He can go eat, and somebody with the Tender could go up and take his place.

Q. All right, sir.

During the time that somebody was on their twelve hours off, though, they didn't come up to do that, did they?

A. Not a member of the drilling crew, under normal circumstances, no.

Q. So the drilling crew would go ahead with the activity on deck that the driller directed they do; isn't that correct?

Was he pretty much in charge of the crew?

A. Yes.

Q. And the crew, while it was on its twelve hours off pretty much had that time to itself and wouldn't be on deck doing drilling activiites; is that correct?

A. The crew that was off was off, yes. That's right.

Q. And it took five or six people to change a drill bit; is that correct?

A. Well, that's normally what we use, yes.

Q. And to drill—If the driller told all five or six of them to be there to help change the drill bit [26] is that pretty much what they would do?

A. Yes, sure would.

Q. And a drill bit might need to be changed at any time; isn't that correct?

A. It's possible.

Q. Was the gentleman—Who was in charge of the New Orleans office that you mentioned?

A. I guess that was Yancey.

Q. C. W. Yancey?

A. C. W. Yancey.

Q. Is he still with Rowan?

A. No. He retired several years ago.

Q. Do you know where he resides?

A. Well, depends on what time of the year. He travels a bit.

His home is here in Houston.

Q. Do you remember what a member of a drilling crew was making back in '67, '68 and '69?

A. I have no idea.

Q. Do you remember if it would have been by the hour?

A. Well——

Q. Just roughly. I'm just talking about in general.

A. The drilling crews were normally paid by the hour.

Q. Do you remember any "ball park" figures for what that would have been, if you remember? If you don't, that's all right.

A. I don't remember.

MR. BURKETT: I've got no further questions.

MR. THEIS: Oh, I had a few, but I think I can hold those off until we go to trial and ask them then and save time now.

/s/ C. W. YEARGAIN
Witness

STATE OF TEXAS
COUNTY OF HARRIS

Subscribed and sworn to before me by the said witness, C. W. Yeargain, on this the 21st day of March, A.D., 1976.

/s/ MARY A. CHIASSON
Notary Public in and for
Harris County, Texas

[SEAL] My Commission Expires January 4, 1979.

[28]

CERTIFICATE FOR FEDERAL COURT

STATE OF TEXAS
COUNTY OF HARRIS

I, Wayne Hutson, a Notary Public duly commissioned and qualified in and for the County of Harris, State of Texas, do hereby certify that, pursuant to notice and the agreement hereto annexed, there came before me on the 14th day of October, 1976, at 2:00 o'clock p.m., at the offices of Rowan Companies, Inc., 1820 South Post Oak Tower, Houston, Texas, the following named person, to-wit: C. W. Yeargain, who was by me duly sworn to testify the truth, and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; and that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision; and the deposition is a true record of the testimony given by the witness, same to be sworn to and subscribed by said witness before any Notary Public in and for the State of Texas, pursuant to the agreement of the parties.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or [29] financially interested in the action.

In witness whereof, I hereunto set my hand and affixed my notarial seal this 28th day of October, A.D., 1976.

/s/ WAYNE HUTSON
Wayne Hutson, Notary Public in and for Harris County, Texas.

My Commission expires September 25, 1977.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil No. 75-H-1818

ROWAN COMPANIES, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS
COUNTY OF HARRIS

Eddie Dyer, being first duly sworn, deposes and says:

I am Eddie Dyer, and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of Plaintiff, Rowan Companies, Inc., in its Motion For Summary Judgment in the above described lawsuit.

During the calendar years 1967, 1968 and 1969, and prior thereto, I was employed by Muchowich Marine Services, Inc., and its successor, Dearborn Marine Service, Inc., at Freeport, Brazoria County, Texas, in managerial and executive officer capacities. Both corporations were engaged in the business of furnishing transportation services by vessels owned by them to transport supplies and personnel between shore ports and places and offshore drilling rigs and platforms in the Gulf of Mexico. While so employed, my time was mostly devoted to soliciting business from and negotiating vessel transportation contracts with oil companies and offshore oil and gas well drilling contractors operating offshore Texas and Louisiana in the Gulf of Mexico.

The vessel transportation business was highly competitive among the several marine transportation service operators in the Gulf of Mexico and frequently required submitting competitive bids to obtain work for the vessels owned by the two corporations named above. It was very important to my continued successful performance of my duties in the capacities stated above that I remained currently abreast of prices being charged by the several marine transportation service operators in the Gulf of Mexico, and, as a consequence, I can state on the basis of my personal knowledge and experience the prevailing rates being charged by marine transportation industry for the transportation of a ten to fifteen member drilling crew between shore and offshore drilling locations in the Gulf of Mexico during the calendar years 1967, 1968 and 1969.

Based on my personal knowledge and experience outlined above, my testimony is that during the calendar years 1967, 1968 and 1969, the prevailing charges in the marine transportation market for a vessel of sufficient capacity to transport a ten to fifteen member drilling crew in the Gulf of Mexico between shore and offshore drilling rigs and platforms, manned by its normal vessel crew, was from $275.00 to $350.00 per day, plus fuel to be furnished by the party engaging the vessel. The type of vessel then being used was diesel engine powered and consumed fuel at the average rate of 30 gallons per hour with fuel costs averaging about 15 cents (15¢) per gallon. The expected speed of such vessel was between 17 and 20 miles per hour.

/s/ Eddie Dyer
Eddie Dyer

THE STATE OF TEXAS
COUNTY OF HARRIS

Eddie Dyer, having been first duly sworn, says that he has read the foregoing Affidavit In Support of Motion For Summary Judgment in the above entitled and numbered action knows the contents thereof and that the same is true to his own knowledge.

/s/ EDDIE DYER
Eddie Dyer

SUBSCRIBED and SWORN to before me, the undersigned notary public, on this 23rd day of March, 1977.

/s/ JOYCE McCOY
Notary Public in and for
Harris County, Texas

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil No. 75-H-1818

ROWAN COMPANIES, INC., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS
COUNTY OF HARRIS

C. W. Yeargain, being first duly sworn, deposes and says:

I am C. W. Yeargain, and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of Plaintiff, Rowan Companies, Inc., in its Motion For Summary Judgment in the above described lawsuit.

I am the same C. W. Yeargain who testified as a witness in this lawsuit by deposition taken by Mr. Joe W. Burkett on October 14, 1976, in the office of Rowan Companies, Inc.

As I said in the deposition, I was a toolpusher in the Company's Gulf Coast Division in 1967, 1968 and 1969, which included the duty of hiring drilling crew members for offshore drilling rigs.

In the process of interviewing and hiring drilling crew members for the offshore drilling rigs, the discussion with applicants amounted to the type of work he was being hired for, how many days on the rig and how many days

off duty and, if the applicant did not already know, what his hourly wage rate would be.

The Company hired the caterers and was the only one who could fire them or make them replace one of their people or discontinue catering of food service completely; the drilling crew had no right to participate in the decision of hiring and firing caterers and whether the food and lodging would continue. The caterers prepared and served all meals and did the housekeeping in the sleeping and living area to the satisfaction of the Company's supervisors on the drilling rig.

Drilling crew members were not required to eat the food or use the lodgings on the drilling rig, and if they missed one or more meals or one or more nights' sleep on the rig, they were not paid any money or given anything else in place of missed meals or lodgings. The food and lodging was the same for all crew members, regardless of pay rate, and if a drilling crew member did not like the food or lodging offered him, he could and would quit and find a rig which suited him better. The Company had a policy of making no agreements or discuss understandings concerning food and lodging on its rig with drilling crew members, because the Company wanted to and did keep complete control over this part of its operation. Both the food and lodging was very good, and I don't know of any drilling crew member leaving one of the Company's drilling rigs because of the food or lodging.

Meals were served on schedules, as I said in my deposition, and a drilling crew member would have time off to eat his meals and would not be required to do anything during that time.

The Company did not change crews on drilling rigs like on land drilling rigs, because Rowan would have had to hire boats by the day for this and it would have been more expensive to haul the crew between the shore and the rig

by boat at the end of each shift than it was to furnish them food and lodging.

In my deposition I testified that the tenders were "dumb barges." A dumb barge is a ship-shaped barge without propulsion power and does not require a crew to move from place to place. A dumb barge is towed from place to place by a tow boat. When it is working as a tender at a production or drilling platform, some members of the drilling crew work on the tender to operate a part of the drilling equipment which is on the tender, such as the engines and generators to provide power to the drilling machinery placed on the platform and the mud pumps and mud system and things like that. The caterer also works on the tender.

/s/ C. W. YEARGAIN
C. W. Yeargain

THE STATE OF TEXAS
COUNTY OF HARRIS

C. W. Yeargain, having been first duly sworn, says that he has read the foregoing Affidavit In Support of Motion For Summary Judgment in the above entitled and numbered action, knows the contents thereof, and that the same is true to his own knowledge.

/s/ C. W. YEARGAIN
C. W. Yeargain

SUBSCRIBED and SWORN to before me, the undersigned notary public, on this 21st day of March, 1977.

/s/ MARY A. CHIASSON
Notary Public in and for
Harris County, Texas

[SEAL] My Commission Expires January 4, 1979.

SUPREME COURT OF THE UNITED STATES

No. 80-780

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

Filed January 19, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

No. 80-780

DEC 16

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-780

ROWAN COMPANIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether meals and lodging furnished by petitioner without charge to its employees while they were working on offshore oil rigs constituted "wages" for social security (FICA) and federal unemployment insurance (FUTA) tax purposes.

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OPINIONS BELOW

The order of the district court (Pet. App. 13a) is not reported. The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 624 F. 2d 701.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1980 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. App. 14a-15a.[1] The relevant portions of Section 31.3121(a)-1(f) and of Section 31.3306(b)-1(f) of the Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.) are set forth at Pet. App. 16a-17a.

STATEMENT

1. During the years at issue (1967-1969), petitioner contracted with other firms to drill oil and gas wells both on land and beneath offshore waters. When drilling offshore, petitioner would move its rig to the owner's location, which was often as much as 60 miles from land. The rig was operated by a drilling crew that typically included from four to twelve persons. Each offshore rig operated 24 hours a day and was manned by two crews, each of which worked a 12-hour shift. Members of a crew usually remained offshore for a ten-day tour of duty aboard the rig, followed by a five-day

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[1]Section 3121(a) is derived from Section 811(a) of the Social Security Act of 1935, ch. 531, 49 Stat. 639, and is now part of the Federal Insurance Contribution Act (FICA). Section 3306(b) is derived from Section 907(b) of the Social Security Act of 1935 (49 Stat. 642), and is now part of the Federal Unemployment Tax Act (FUTA).

period of leave. When a crew's new tour commenced, petitioner provided transportation to the offshore location (Pet. App. 2a).

Because of the high cost of transporting crews to and from land at the beginning and end of each shift, petitioner engaged a caterer to provide meals and maintain living quarters for crews working offshore. The eating facilities, sleeping quarters and lounge areas used for leisure activities while a crew was off duty were usually located on a vessel moored alongside the drilling platform (Pet. App. 2a).

Petitioner's decision to provide meals and lodging to its offshore rig employees was unilateral and based upon its own economic reasons. It was not a result of either individual or collective bargaining. Petitioner furnished identical meals and facilities to all employees regardless of their status or rate of pay. An employee who for any reason did not elect to eat meals furnished did not receive an allowance in lieu of the meals (Pet. App. 2a).

Petitioner did not include the value of the meals and lodging in the employees' wage base for purposes of computing the amount of social security (FICA) taxes to be paid by it and the employee and the amount of unemployment insurance (FUTA) taxes to be paid by it. Upon examination of petitioner's tax returns for 1967-1969, the Internal Revenue Service added the fair market value of the meals and lodging in the FICA and FUTA wage bases of the offshore rig employees.[2] After paying the resulting deficiencies, petitioner brought this refund suit in the United States

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[2]The Service did not include the value of the meals and lodging in the employees' wage base for income tax withholding purposes because it determined that these privileges were extended to the employees for petitioner's convenience and were therefore excludable from the employees' gross income under Section 119 of the Internal Revenue Code of 1954. Section 119 provides that an employee's gross income

District Court for the Southern District of Texas (Pet. App. 3a). The district court granted summary judgment for the government (Pet. App. 13a).

2. The court of appeals affirmed (Pet. App. 1a-12a). It first observed that the term "wages" for purposes of FICA and FUTA is broadly defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." See 26 U.S.C. 3121(a), 3306(b). The court then noted that since 1940, the Commissioner's Regulations have excluded from wages facilities or privileges of relatively small value furnished employees by the employer, but have included meals or lodging furnished to seamen or other employees aboard vessels. See Treasury Regulations on Employment Tax, Sections 31.3121(a)-1(f), 31.3306(b)-1(f) (26 C.F.R.) (Pet. App. 4a-5a).

The court of appeals upheld the Regulations as consistent with the statute. In so ruling, the court followed similar decisions upholding the FICA and FUTA Regulations in *Pacific American Fisheries, Inc.* v. *United States*, 138 F. 2d 464 (9th Cir. 1943); and *S.S. Kresge Co.* v. *United States*, 379 F. 2d 309 (6th Cir. 1967) (Pet. App. 6a). The court noted that such meals and lodging furnished for the convenience of the employer are excluded from "wages" for purposes of income tax withholding, but held that this

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does not include the value of employer-furnished meals or lodging as long as such meals and lodging are furnished for the convenience of the employer and on the employer's premises. Because the value of such meals and lodging was excluded from gross income, it was not part of the employees' "wages" base for purposes of income tax withholding. Section 31.3401(a)-1(b)(9) of the Treasury Regulations on Employment Tax (26 C.F.R.), specifically excludes from "wages," for purposes of computing income tax withholding, amounts that are not included in an employee's gross income. There are no similar exclusions in the FICA and FUTA Regulations.

exclusion does not in any way qualify the FICA and FUTA definition of wages. The court of appeals accordingly distinguished *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), which involved income tax withholding on an employer's reimbursement for lunch expenses of employees. As the court stated, "a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments" (Pet. App. 7a).

The court of appeals acknowledged that its decision conflicts with *Hotel Conquistador, Inc.* v. *United States*, 597 F. 2d 1348 (Ct. Cl. 1979), cert. denied, 444 U.S. 1032 (1980), and *Oscar Mayer & Co.* v. *United States*, 623 F. 2d 1223 (7th Cir. 1980), which respectively held that the value of meals furnished hotel and restaurant employees and company cars to employees for below-cost personal use are not "wages" for purposes of FICA and FUTA. However, the court rejected the central premise of the Court of Claims and the Seventh Circuit in those cases that if an item is excludable from "wages" for income tax withholding purposes, it is likewise excludable for FICA and FUTA tax purposes. The court below was "unable to subscribe to [the] conclusion * * * that the same words used in different statutes must mean the same thing and that, therefore Congress intended to deny interpretative power to the Secretary (Pet. App. 11a).

DISCUSSION

1. The court of appeals correctly held that the meals and lodging petitioner furnished its offshore rig employees are includable in their "wages" for purposes of the social security (FICA) and unemployment insurance (FUTA) taxes.

Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954 broadly define "wages" for purposes of FICA

and FUTA tax provisions as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." These employment taxes were enacted in 1935 as part of the Social Security Act, ch. 531, 49 Stat. 620, in order to provide old age, disability, and unemployment benefits to workers.[3] To accomplish this purpose, Sections 3101, 3111 and 3121(a) of the Internal Revenue Code of 1954 imposed a tax (FICA) on both employers and employees, equal to stated percentages of the "wages."[4] Under Title II of the Social Security Act (42 U.S.C. 401 *et seq.*), the Internal Revenue Service regularly reports to the Social Security Administration the amount of each employee's "wages" on which taxes have been paid. That amount serves as the basis for computing each employee's old age and disability benefits. See *United States* v. *Silk*, 331 U.S. 704, 711 (1947). During the years at issue, unemployment taxes (FUTA) were also imposed solely on employers with respect to the first $3,000[5] of "wages" paid to their employees (Section 3306(b)).

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[3]The old age and disability tax provisions of Title VIII of the Social Security Act of 1935, and the unemployment compensation tax provision of Title IX of the Act, were recodified as Chapter 9 of the Internal Revenue Code of 1939. H.R. Rep. No. 6, 76th Cong., 1st Sess. 3-4 (1939). These Social Security taxes were then incorporated into Subtitle C of the Internal Revenue Code of 1954, as the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

[4]The FICA tax was originally imposed on the first $3,000 of each employee's annual wages. Section 811 (49 Stat. 639). As of 1980, the tax is imposed on the first $25,900 of annual wages. In 1981, the tax and benefit base will be increased to $29,700. Pub. L. No. 95-216, Section 103(b)(2), 91 Stat. 1513.

[5]Originally, the tax was imposed on the entire year's wages. Sections 901, 907 (49 Stat. 639, 642). As of 1978, the tax is imposed on the first $6,000 of annual wages. Pub. L. No. 94-566, Section 211(a), 90 Stat. 2676.

In enacting the social security taxes, Congress intended to impose the excises on a broad range of employer-furnished remuneration. The Committee Reports state that wages include compensation for services paid in any form, such as room or board. H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 49 (1935). Thus, since 1940, the FICA and FUTA Regulations have defined "wages" to mean "all remuneration for employment," even if such remuneration is furnished for the "convenience of the employer" and is thereby excluded from "wages" for federal income tax withholding purposes under Sections 119 and 3401 of the Internal Revenue Code of 1954.[6] The fact that items of compensation may be includable in the "wages" base for FICA and FUTA tax purposes even though excludable from gross income for income tax purposes is consistent with the broad social welfare goals of the Social Security program. See *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946); *United States* v. *Silk, supra; S.S. Kresge Co.* v. *United States*, 218 F. Supp. 240, 243 (E.D. Mich. 1963); H.R. Rep. No. 615, 74th Cong., 1st Sess. 21 (1935). The Regulations specify that, for Social Security tax purposes, the value of meals or lodging furnished by an employer ordinarily constitutes taxable "wages." For purposes of this case, the pertinent

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[6]See S.S.T. 383, 1940-1 Cum. Bull. 210; Mim. 5657, 1944 Cum. Bull. 550; and Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, all explaining Treas. Reg. 106, § 402.227 (1940 ed.) (FICA) and Treas. Reg. 107, § 403.227 (1940 ed.) (FUTA). These Regulations were carried forward substantially unchanged in Treas. Reg. 128, § 408.226 (1951 ed.). The current Regulations were promulgated in 1956. T.D. 6190, 1956-2 Cum. Bull. 605, 619 (FICA); T.D. 6199, 1956-2 Cum. Bull. 721, 740 (FUTA). *Pacific American Fisheries, Inc.* v. *United States*, 138 F. 2d 464, 465 (9th Cir. 1943); *S.S. Kresge Co.* v. *United States*, 379 F. 2d 309 (6th Cir. 1967). Compare *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977).

portion of the Regulations provides as follows (Section 31.3121(a)-1(f), 26 C.F.R., (emphasis supplied)):[7]

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. *The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.*

Given the breadth of the statutory definition of "wages" to include the "value of meals or lodging furnished * * * to * * * seamen or other employees aboard vessels * * *," the decision below correctly included the value of the meals and lodging in the employees' FICA and FUTA tax base in accordance with the command of the controlling Regulations. These Regulations were promulgated pursuant to specific congressional delegations of authority.[8] Since they are reasonable and consistent with the statute, the court

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[7]Section 31.3306(b)-1 of the Treasury Regulations on Employment Tax, which defines "wages" for FUTA purposes, is virtually identical.

[8]The legislative delegations with respect to the tax provisions were contained in Sections 808, 908 and 1102 of the Social Security Act of 1935 (49 Stat. 638, 643, 647). Section 1102 is now codified as 42 U.S.C. 1302. Sections 808 and 908 were reenacted respectively as Sections 1535 and 1609 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)). In the Internal Revenue Code of 1954, Sections 808 and 908 were not retained

of appeals correctly upheld the validity of the Regulations. *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 533 n.11 (1979); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 484 n.19 (1979).

2. The issue of includability of employer-furnished meals and lodging in the employees' FICA and FUTA wage tax base presented here is essentially identical to the question presented in our petition for certiorari last Term (No. 79-742) in *Hotel Conquistador, Inc.* v. *United States*, 597 F. 2d 1348 (Ct. Cl. 1979), cert. denied, 444 U.S. 1032 (1980). There, the Court of Claims held that the value of meals furnished to hotel and restaurant employees for the employer's convenience was not includable as "wages" for FICA and FUTA tax purposes. In seeking review by this Court, we argued that the decision of the Court of Claims conflicted with *S.S. Kresge Co.* v. *United States*, 379 F. 2d 309 (6th Cir. 1967), and *Pacific American Fisheries, Inc.* v. *United States*, 138 F. 2d 464 (9th Cir. 1943). Accord: *S.S. Kresge Co.* v. *United States, supra*, 218 F. Supp. at 240. In those cases, the Sixth and Ninth Circuits ruled in comparable situations that the value of free meals furnished by employers is a part of the employees' "wages" for purposes of FICA and FUTA.

As we pointed out (at 8-10) in our petition for certiorari in *Hotel Conquistador*, we believe that this Court should resolve the conflict and establish a national rule with respect

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in separate sections. Instead, they were incorporated into Section 7805 of the Internal Revenue Code of 1954, without any change in meaning or scope. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954). See *Goldsboro Christian Schools, Inc.* v. *United States*, 43 A.F.T.R.2d para. 79-473, at 872 & n.12 (E.D. N.C. Sept. 27, 1978), on appeal, No. 80-1473 (4th Cir.).

The legislative delegations respecting the benefit statutes were contained in Sections 205 and 1102 of the Act (49 Stat. 624, 647), which are now codified as 42 U.S.C. 405(a) and 1302.

to this common form of compensation for hotel and restaurant workers, and, as here, for other employees stationed in remote areas. The decision below demonstrates that since the Court's denial of certiorari in *Hotel Conquistador*, the conflict has persisted and, indeed, has become more explicit. We therefore submit that the Court should grant the petition in this case.

In *Hotel Conquistador*, the Court of Claims refused to follow the Sixth Circuit's decision in favor of the government in *S.S. Kresge Co.* on the ground that the court there "did not have * * * the benefit of the criteria to apply to regulations in this area, as prescribed in *Central Illinois* [*Public Service Co.* v. *United States*, 435 U.S. 21 (1978)]" (597 F. 2d at 1354). However, this Court's decision in *Central Illinois Public Service Co.* does not bear upon the question presented in this case. There, the Court held that an employer's reimbursement for 1963 lunch expenses of employees on nonovernight company travel did not constitute "wages" subject to withholding by their employer within the meaning of Section 3401(a) of the Internal Revenue Code of 1954.

Central Illinois Public Service Co. turned on the fact that the pertinent Treasury Regulations excluded from the concept of wages, for purposes of *income* tax withholding, amounts paid for travel or other business expenses without regard to whether the travel was away from home overnight. In these circumstances, the Court was reluctant to impose secondary tax liability on the employer by retroactively applying the overnight rule of *United States* v. *Correll*, 389 U.S. 299 (1967), to the year 1963 when "not one regulation or ruling required withholding on any travel expense reimbursement" (435 U.S. at 32). Here, by contrast, the Treasury Regulations and the published rulings extant during the year at issue unambiguously require the

inclusion of meals (and lodging) in the FICA and FUTA "wages" tax base. The Court of Claims therefore erred in concluding that *Central Illinois Public Service Co.* undermined the authoritative force of *S.S. Kresge Co.* v. *United States, supra.* As the court below succinctly put it in similarly distinguishing *Central Illinois Public Service Co.*, "[t]he factors considered [in that case] * * * do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations, is invalid" (Pet. App. 10a; footnote omitted).

The Seventh Circuit, however, has aligned itself with the Court of Claims. In *Oscar Mayer & Co.* v. *United States*, 623 F. 2d 1223 (1980), that court held that an employer's furnishing company-owned cars for the personal use of employees at less than cost did not constitute "wages" for FICA and FUTA purposes. In so ruling, the court relied upon this Court's decision in *Central Illinois Public Service Co.* and the discussion of that case by the Court of Claims in *Hotel Conquistador* for the proposition that the term "wages" should be construed identically for income tax withholding and for FICA and FUTA tax purposes (see 623 F. 2d at 1226-1227).[9]

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[9] *Royster Co.* v. *United States*, 479 F. 2d 387 (4th Cir. 1973), which petitioner cites (Pet. 5, 7, 9), does not conflict with the decision below. Rather, the principal question presented in that case was the same as in *Central Illinois Public Service Co.* In *Royster Co.*, the court held that payments for noon meals consumed by salesmen engaged in nonovernight travel were not "wages" under Section 3401(a) for purposes of *income* tax withholding. Since the FICA and FUTA Regulations with respect to such travel reimbursements were identical to the income tax withholding Regulations, the Court further held them to be excludable from the FICA and FUTA "wages" base. Here, however, the meals and lodging involved are of a non-travel character that are governed by different Regulations. Indeed, a district court in the Fourth Circuit has held that lodging furnished by an employer to its employees without charge is includable in the employees' FICA and FUTA wage base. See *Goldsboro Christian Schools, Inc.* v. *United States, supra.*

3. It is therefore clear that *Hotel Conquistador* did not put to rest the conflict among the lower courts with respect to whether meals, lodging and other fringe benefits furnished to employees are part of their "wages" for FICA and FUTA tax purposes. That conflict has persisted. As matters now stand, the Fifth Circuit in the decision below, and the Sixth and Ninth Circuits have held that such benefits are so includable, while the Court of Claims and the Seventh Circuit have ruled they are not. Moreover, there is explicit disagreement among the court below, on the one hand, and the Court of Claims and the Seventh Circuit, on the other hand, as to whether this Court's decision in *Central Illinois Public Service Co.* has any bearing on the FICA and FUTA tax question presented here. This Court should dispel the confusion among the circuits and establish a uniform definition of "wages" for employee fringe benefits such as meals, lodging and the like, for the benefit of employers, employees, and the Treasury.

Indeed, the need for resolution of the conflict is underscored by the growing administrative importance of the question. In our petition in *Hotel Conquistador* (at 9-10) filed in November 1979, we stated that there were then 630 cases pending at the audit and appellate administrative levels involving the meals-as-wages issue, with $11,544,720 in FICA and $739,077 in FUTA taxes at stake. During the past year, the revenue involved has substantially increased. We are advised by the Internal Revenue Service that there are now 622 cases pending in the audit and appellate levels with $17,443,953 in FICA and $544,443 in FUTA taxes at stake, and 19 cases pending in litigation. Moreover, there are presently 15,011 FICA and FUTA refund claims pending in the total amount of $12,375,969.[10] These figures

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[10]The Service further advises that these figures do not include refund claims that do not compute the particular amount at issue but simply claim all amounts due and owing.

appear to confirm the prediction by the national tax director of a major accounting firm that the decision of the Court of Claims in *Hotel Conquistador* "will spawn more refund claims than any [decision] I've seen in 15 or 20 years * * *" (Wall Street Journal, May 1, 1979, at 1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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No. 80-780

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In The Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., PETITIONER,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

MEMORANDUM FOR THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AS *AMICUS CURIAE*

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MEMORANDUM FOR THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AS *AMICUS CURIAE*

The International Association of Drilling Contractors, with the consent of the parties, submits this memorandum *amicus curiae* in support of the petition for a writ of certiorari.

INTEREST OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

The International Association of Drilling Contractors is a trade association that represents the interests of

the oil and gas drilling industry. Many of the Association's members are drilling contractors who own or operate off-shore drilling rigs. The efficient and economical operation of such drilling rigs requires that employees remain off-shore on the rig for a tour of duty lasting several days. To facilitate this method of operation, the drilling contractor, for its own convenience, provides the employees with meals and lodging on the rig without charge. The Association and its members therefore have an obvious interest in this case, which presents the question whether the fair market value of such meals and lodging constitutes "wages" on which the employer must pay Social Security ("FICA") and Federal Unemployment Insurance ("FUTA") taxes.

SUMMARY OF ARGUMENT

The decision below is inconsistent in principle with this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), and it squarely conflicts with *Royster Co.* v. *United States*, 479 F.2d 387 (4th Cir. 1973), *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1032 (1980), and *Oscar Mayer & Co., Inc.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980). The question presented is important to the administration of the federal tax laws. Accordingly, the petition for a writ of certiorari should be granted to resolve the existing conflict among the courts of appeals and to decide an important question of federal law.

ARGUMENT

1. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeals.

The FICA tax is calculated as a percentage of the employee's "wages." *See* 26 U.S.C. §§3101(a) and 3111(a). An employer must withhold the employee's portion, and pay the employer's portion, of this tax. *See* 26 U.S.C. §§3102(a) and 3111(a). The FUTA tax, which is paid solely by the employer, also is calculated as a percentage of the employee's "wages." *See* 26 U.S.C. §3301. The definition of "wages" is the same for each tax: "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash. . ." 26 U.S.C. §§3121(a) and 3306(b). The question presented in this case concerns the application of this statutory definition to meals and lodging furnished by the employer for its own convenience.

The court of appeals held that the fair market value of meals and lodging furnished by an employer to its employees without charge, solely for the convenience of the employer, constitutes "wages" and therefore that the employer must withhold and pay FICA and FUTA taxes based upon a percentage of that fair market value. In so holding, the court largely ignored the teaching of this Court's decision in *Central Illinois* and expressly rejected as incorrect the decisions of the Fourth and Seventh Circuits in *Royster* and *Oscar Mayer* and of the Court of Claims in *Hotel Conquistador*.

In *Central Illinois*, this Court was confronted with the question whether cash reimbursements for lunch expenses constituted "wages" for the purpose of the employer's obligation to withhold federal income taxes. "Wages," for that purpose, is defined by statute as "all

remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash. . . ." 26 U.S.C. §3401(a). This Court held that reimbursement for the reasonable expenses of meals incurred in travel on the employer's business was not "remuneration" and therefore did not constitute "wages" giving rise to an obligation to withhold. The Court reasoned:

> An expansive and sweeping definition of wages . . . is not consistent with the existing withholding system. . . . Congress chose simplicity, ease of administration, and confinement to wages as the standard. . . . This was a standard that was intentionally narrow and precise.

435 U.S. at 31.

It necessarily follows from *Central Illinois* that the value of the meals and lodging furnished by petitioner in this case did not constitute "wages" for purposes of federal income tax withholding: if in *Central Illinois* reimbursement for meals was not "wages," *a fortiori* actual meals and lodging, provided to employees solely for the convenience of the employer, are not "wages." Indeed, the government now concedes that such meals and lodging are not "wages" for the purpose of income tax withholding. *See* Pet. App. B, p. 4a.

But it also follows from *Central Illinois* that meals and lodging furnished to employees for the convenience of their employer cannot be "wages" for FICA or FUTA tax purposes. For the purposes of FICA and FUTA taxes, just as for federal income tax withholding, the question whether an item constitutes "wages" turns on whether it was paid or provided as remuneration for employment services. The same "intentionally narrow

and precise" standard governs the employer's obligation under each of the three separate taxing schemes.[1] Thus if an item is not "wages" for the purpose of federal income tax withholding, it is not "wages" for FICA or FUTA tax purposes either.

Moreover, to treat the fair market value of meals and lodging furnished for the convenience of the employer as "wages" giving rise to an obligation to pay FICA and FUTA taxes would frustrate the congressional objectives of simplicity and ease of administration identified by this Court in *Central Illinois*: the employer would be required not only to conform to different standards under the different withholding statutes but also to determine its liability for FICA and FUTA taxes on the basis of speculative assessments of fair market value.

These and other considerations have led other lower federal courts to hold that items similar to the meals and lodging involved here do not constitute "wages" for purposes of FICA and FUTA taxes. Thus, even before this Court's decision in *Central Illinois*, the Fourth Circuit in *Royster* held that reimbursements for lunch expenses, incurred in the course of travel on the employer's business, "were not wages as that term is used in the FUTA and FICA and income tax withholding statutes." 479 F.2d at 392.[2] Subsequently, the

---

[1] Even the court below acknowledged that the three statutory definitions are "for present purposes identical. . . ." Pet. App. B, p. 7a. And before this Court decided *Central Illinois*, the government itself consistently had argued that "wages has the same essential meaning under all the statutes here in question." *Royster Co.* v. *United States*, 479 F.2d at 390.

[2] Certiorari was granted in *Central Illinois* in order to resolve the conflict with *Royster* with respect to income tax withholding. *See* 435 U.S. at 24.

Seventh Circuit in *Oscar Mayer* held that the fair market value of the incidental personal use of company cars by employees did not constitute "wages" for purposes of FICA and FUTA taxes.[3] The court concluded that "the reasoning of *Central Illinois* regarding the concept of 'wages' directly applies and calls for rejection of these FICA and FUTA taxes." 623 F.2d at 1228. Finally, the Court of Claims held in *Hotel Conquistador* that the fair market value of meals provided by the employer on its premises and for its convenience does not constitute "wages" giving rise to an obligation to pay or withhold FICA and FUTA taxes.

The decision below squarely conflicts with these three decisions. Indeed, the court of appeals in this case expressly noted the conflict, stating that "we are unable to agree with the rationale adopted by the Court of Claims in *Hotel Conquistador*. . . ,"[4] Pet. App. B, p.

[3] In *Oscar Mayer*, the government originally took the position that such fair market value constituted "wages" for the purpose of income tax withholding as well. That position was abandoned after this Court's decision in *Central Illinois*. *See* 623 F.2d at 1224-25.

[4] The court below relied upon 26 C.F.R. §§31.3121(a)-1 and 31.3306(b)-1, which provide that "ordinarily" the value of meals or lodging constitutes "wages" because "generally" such items are furnished as remuneration. *See* Pet. App. B, p. 6a. The Court of Claims in *Hotel Conquistador* quite properly refused to accept those regulations as controlling:

> Viewed as a hunting license to authorize IRS agents to flush up additional revenue from employers, the regulation is brilliantly conceived. As a guide to employers in their relations with employees, it is nearly worthless. . . .
>
> We think in any case when the only guide to Treasury policy was the unsatisfactory regulation above quoted, the employer should not be assessed for not withholding unless he could have told from the statute itself that his proposed free food or lodging for employees was "remuneration," and in this regard, the statute should be given a fairly strict though not hostile construction.

597 F.2d at 1354.

12a, and that "we are unable to subscribe to [the] conclusion [of the courts in *Royster, Oscar Mayer*, and *Hotel Conquistador*]," *id.* This Court should grant review in order to resolve this acknowledged conflict among the lower federal courts.

2. The Question Presented Is Important To The Administration Of FICA And FUTA Taxes.

The decision in this case will have a direct impact on employers and employees in all industries where workers must be quartered on the job site, including many members of the *amicus* Association and their employees. Beyond that, the decision can be expected to affect the FICA and FUTA tax liabilities of thousands of employers in other industries that who find it appropriate, for their own convenience, to furnish meals, lodging, or other similar items to employees.

An indication of the significance of the question presented to the administration of FICA and FUTA taxes was provided by the government in its petition for certiorari in *Hotel Conquistador*:

> [W]e are advised by the Internal Revenue Service that there are currently 630 cases pending at the audit and appellate administrative levels involving the meals-as-wages issue, with $11,544,720 in FICA and $739,077 in FUTA taxes at stake. There are also 17 cases pending in litigation regarding this issue, involving approximately $1,092,000 in FICA and FUTA taxes. The question whether similar fringe benefits constitute FICA and FUTA "wages" is present in 1,331 cases at the audit and appellate levels, involving $24,097,130 in FICA taxes and $704,222 in FUTA taxes. Finally, there are nine cases in litigation involving FICA and FUTA taxes on such fringe benefits, involving approximately $236,000.

Pet. 9-10, No. 79-742 (footnotes omitted). The conflict created by the decision below throws this area of the law into greater confusion and uncertainty and substantially increases the need for authoritative resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 80-780

IN THE

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OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether meals and lodging furnished without charge to employees for the convenience of their employer, and therefore admittedly not "wages" subject to withholding for Federal income tax purposes, are nonetheless "wages" subject to social security (FICA) and Federal unemployment insurance (FUTA) taxes.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 624 F.2d 701, is reproduced in its entirety as Appendix A to the petition for certiorari. The order reviewed below, of the United States District Court for the Southern District of Texas, issued without opinion and not reported, is reproduced in its entirety as Appendix B to the petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 22, 1980. A petition for

certiorari was filed on November 14, 1980, within ninety days of the entry of this judgment. The order allowing certiorari was filed on January 19, 1981. (J.A. 141a)[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 3101, 3102, 3111, 3121, 3301, 3306, 3401 and 3402 of the Internal Revenue Code of 1954 (26 U.S.C. (1971 ed.)), and of Treasury Regulations on Employment Tax §§ 31.3121 (a)-1, 31.3306(b)-1 and 31.3401(a)-1 (26 C.F.R.) are set forth in an Appendix to this brief.

STATEMENT OF THE CASE

This action was brought by the petitioner, Rowan Companies, Inc. ("Rowan"), in the United States District Court for the Southern District of Texas, under 28 U.S.C. § 1346, for refund of Social Security (FICA) and Federal Unemployment Insurance (FUTA) taxes alleged to have been wrongfully assessed and collected from Rowan by the Internal Revenue Service.

The essential facts are undisputed. During the years in issue—1967, 1968, and 1969—Rowen owned and operated a number of land-based and offshore oil and gas drilling rigs (J.A. 5a-6a, 9a-10a, 22a, 42a, 73a-74a, 81a-85a; Cert. App. A, 2a).[2] It operated its land-based rigs with a crew which normally worked six

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[1] "J.A." references are to the Joint Appendix filed herein.

[2] "Cert. App." references are to the appendices contained in the petition for certiorari.

days a week on a seven or eight-hour shift, with each man going home at the end of his shift each day (J.A. 69a-70a). By contrast, Rowan's offshore rigs were operated up to sixty miles offshore; it was not practical for the offshore crews to leave at the end of each shift and consequently two crews were kept at the rig at all times, with each crew working a twelve-hour shift for ten consecutive days; every five days one of the crews went ashore for five days off and meanwhile a new crew came to the rig (J.A. 47a-48a, 59a, 69a-70a, 117a-118a; Cert. App. A, 2a-3a). Because of the cost of transporting crews to and from shore at the start and end of each shift, lodging at the rig and three meals a day at the rig cafeteria style were provided at Rowan's expense for each crew member for each of the ten days he remained aboard (J.A. 50a, 59a, 61a-62a, 87a, 106a, 120a-121a, 125a-126a, 136a, 139a-140a; Cert. App. A, 2a). Each member of each crew was furnished a meal before and after his shift and a third meal on a staggered basis in the middle of his shift (J.A. 128a-129a). The cost to Rowan of providing transportation ashore at the beginning and end of each shift—typically two hours in and two hours back—would have been $275 to $350 per day for each crew or roughly $25 per man, as compared to a cost to Rowan of about $6 per day per man for providing such meals and such lodging at the rig (J.A. 125a-126a, 136a, 139a-140a, 31a-32a). When a crew was off duty, its members were not expected to perform any services, nor was a crew member expected to assist in any work at his own mealtime (J.A. 130a-131a, 139a-140a).

Rowan's employees were not unionized and there was no agreement with them individually or collectively to

furnish food and lodging (J.A. 74a, 122a-123a, 139a-140a; Cert. App. A, 2a). The type of food and lodging furnished was the same for all crew members, irrespective of pay scale, and for all employees of other employers working on the drilling rig (with reimbursement to Rowan by such employers) (J.A. 139a-140a, 33a-34a, 62a-63a, 73a-74a, 80a-85a; Cert. App. A, 2a). They got no cash allowances if they refused such meals or lodging and Rowan was not obligated to furnish transportation to and from shore except at the time of crew changes (J.A. 125a-126a, 139a-140a; Cert. App. A, 2a). No meals or lodgings were provided to crew members during their off duty days and they had to obtain meals and maintain regular lodging ashore at their own expense.

Although paid substantially the same cash wages, crew members on Rowan's land-based rigs, who went home each day, were not furnished meals or lodging (J.A. 69a-70a, 47a-48a, 53a).

Rowan did not include the value of meals and lodging furnished the offshore employees in computing an employee's wages for purposes of income tax withholding or FICA or FUTA tax purposes.

The Government concedes that such offshore meals and lodging were furnished for the convenience of taxpayer as an employer and accordingly do not constitute "wages" subject to income tax withholding (Cert. App. A, 3a).[3] Nevertheless, the Government asserts that the meals and lodging are "wages" for FICA and FUTA tax purposes, and it assessed a deficiency against Rowan based on including a fair market value of $6 per

[3] See also Brief for the United States on Petition for a Writ of Certiorari, p.2, fn.2.

day per man for such meals and lodging in the base for withholding employee FICA tax and computing employer FICA and FUTA tax (J.A. 5a-6a, 9a-10a, 12a-15a, 31a-32a; Cert. App. A, 3a). Rowan paid such taxes and thereafter, after filing timely claim, filed this suit for refund of such taxes (Cert. App. A, 3a).

The district court granted a Cross-Motion for Summary Judgment filed by the Government, and the court below affirmed (Cert. App. A, 1a; B, 13a).

SUMMARY OF ARGUMENT

For over sixty years, meals and lodging furnished to employees for the convenience of their employer have been consistently treated in rulings and cases as non-compensatory and therefore not within the definition of "wages" subject to income tax, or (since adoption of income tax withholding in 1942) "wages" subject to income tax withholding.

When FICA and FUTA taxes were initially imposed on "wages" in 1935, the first regulations issued by the Internal Revenue Service specifically recognized that meals and lodging for the convenience of the employer are similarly not "wages" for such purposes. The court below found, however, that, by reason of so-called "facilities or privileges" regulations issued by the Internal Revenue Service in 1940, such meals and lodging are now "wages" subject to FICA and FUTA tax. The court below disregarded the fact that despite ambiguous and confusing language in the 1940 regulations, the Service continued to recognize the applicability of the convenience of the employer test for FICA and FUTA tax purposes off and on until at least 1962. The court below further disregarded a clearly expressed

Congressional intent when income tax withholding was first adopted in 1942 (and restated as recently as 1978) that for reasons of administrative convenience to both taxpayers and the Government, the "wage" base for FICA, FUTA and income tax withholding should be construed and applied identically.

The court below further failed to follow decisions of this Court as to the limited meaning of the term "wages" for tax purposes and as to the absence of administrative authority to change the meaning of such term by regulations. In addition to being without valid precedent and contrary to recent decisions of two other circuits and the Court of Claims, the court below also erroneously failed to follow other applicable regulations and rulings of the Internal Revenue Service still in effect, excluding meals and lodging furnished under the circumstances of this case from "wages" for FICA and FUTA tax purposes.

ARGUMENT

NONCOMPENSATORY MEALS AND LODGING FURNISHED TO EMPLOYEES FOR THE CONVENIENCE OF THEIR EMPLOYER ARE NEITHER INCOME NOR WAGES TO THE EMPLOYEES

I. Meals And Lodging Furnished For The Convenience Of The Employer Are Not Compensation To The Employees.

Meals and lodging furnished employees by their employers for the employers' convenience have been consistently regarded since 1919 as noncompensatory in nature and accordingly not income to employees for Federal income tax purposes. Thus, even though the Revenue Acts as early as 1918 specifically defined income as including "wages . . . of whatever kind and in whatever form paid" (Section 213, Revenue Act of 1918, 40 Stat. 1057), the regulations and rulings issued

by the Bureau of Internal Revenue as early as 1919 directly recognized that such term did not include the value of "board" or "living quarters . . . furnished to employees for the convenience of the employer." Reg. 45, Art. 33 (1919); O.D. 265, 1 Cum. Bull. 71 (1919); O.D. 514, 2 Cum. Bull. 90 (1920). This principle was repeatedly reiterated by the Government in rulings and regulations in the 1920's, 1930's, and 1940's and—as recently pointed out by this Court in *Commissioner* v. *Kowalski,* 434 U.S. 77 at 88, fn. 21 (1978)—also received during this period the repeated approval of the courts. The antecedents and scope of this "convenience of the employer" doctrine were explored in detail by this Court in *Kowalski,* with the following statement noted from the Tax Court's opinion in *Van Rosen* v. *Commissioner,* 17 T.C. 834 (1951), as to the reason for the resulting exclusion:

> "The better and more accurate statement of the reason for the exclusion from the employee's income of the value of subsistence and quarters furnished in kind is found, we think, in *Arthur Benaglia,* 36 B.T.A. 838, where it was pointed out that, on the facts, the subsistence and quarters were not supplied by the employer and received by the employee 'for his personal convenience[,] comfort or pleasure, but solely because he could not otherwise perform the services required of him.' In other words, though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and

> needs of the employee were satisfied was plainly secondary and incidental to the employment." 434 U.S. at 89, fn.21.

In *Rowan's* case, the alternative to providing employees with on-site meals and lodging at a cost of $6 per day per man, namely, transporting the men ashore at the beginning, middle and end of each shift at a cost of $25 per man and transportation time of 2 hours per transit, establish that the meals and lodging furnished by Rowan were for its own convenience and thus did not constitute income to its employees. This has been admitted by the Government (Cert. App. A, 3a), consistent with its recognition that a showing of employer necessity satisfies the "convenience" test, a recognition first generally articulated by the Government in 1921:

> "Where, from the location and the nature of the work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and need not, therefore, be included in computing net income of the employees." O.D. 814, 4 Cum. Bull. 84.

Other examples of employer necessity are set forth in the current regulations under Section 119, the 1954 codification of the convenience of the employer doctrine.[4] Thus, as of the enactment of the Social Security

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[4] Reg. § 1.119-1(a)(2)(ii). Such examples include the need to have employees available for emergency call, a need for short meal periods because of the nature of the employer's business, and the unavailability of alternate meal sources. Prior to enactment of Section 119, the Revenue Acts consistently defined taxable income as including "wages", but meals and lodging for convenience of

Act (49 Stat. 636) in 1935, meals and lodging furnished for the employer's convenience were neither (1) compensation, (2) wages, nor (3) income, to the employee for federal tax purposes.

II. The Four Employment Taxes Are Only Imposed On "Wages."

A. "Wages" has the same general meaning for all employment taxes.

The House and Senate Reports [5] to the 1935 Social Security Act described the three employment taxes then enacted as:

> (1) "an income tax, measured by a certain percentage of wages . . . levied on most wage earners" (employee's share of social security tax to be withheld from wages by employers);
>
> (2) "an excise tax, measured at the same rates on wages paid, . . . levied on employers" (employer's share of social security tax); and
>
> (3) "an excise tax . . . levied on employers . . . measured by . . . wages" (unemployment tax).

"Wages" was defined in the Act [6] to be "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash" [7] and has been described by this Court as being a "well

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the employer had been repeatedly held nontaxable by the Internal Revenue Service and the courts. The 1954 Code codified this rule for the first time.

[5] H.R. Rep. No. 615, S. Rep. No. 628, 74th Cong., 1st Sess. (1935).

[6] Sections 811(a) (relating to social security tax) and 907(b) (relating to unemployment tax).

[7] The statutory definition of "wages" is virtually identical today. See Appendix, *infra*, pp. 2a-3a.

understood word." *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946). That the Government recognized the applicability of the income tax rules to the newly enacted social security and unemployment taxes is shown by Regulations 90, promulgated in 1936 (relating to unemployment (FUTA) tax) which provided:

> "Ordinarily, facilities or privileges (such as . . . cafeterias, restaurants . . .), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely *as a convenience to the employer* or as a means of promoting the health, good will, contentment, or efficiency of his employees." (Emphasis added.)

The Revenue Act of 1942 added a fourth "employment" tax with the imposition on employers of an income tax withholding responsibility based on "wages" paid employees.[8] The Committee reports reflect clearly the Congressional intent that the term "wages" was to have the same general coverage and exclusions for income tax withholding as existed for social security tax purposes:

> "*With certain specified exceptions,* the term is defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer . . . [*t*]*hese exceptions are identical with*

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[8] The Victory Tax provisions of the Revenue Act of 1942 (56 Stat. 884) added to the Internal Revenue Code of 1939, Sections 465 to 470 (effective from January 1 to June 30, 1943), and the Current Tax Payment Act of 1943 (57 Stat. 126) added to the Code Sections 1621-1632 (effective on a permanent basis July 1, 1943).

> *the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope.*" (Emphasis added.) S. Rep. No. 1631, 77th Cong., 2d Sess. 166 (1942).[9]

The stated reason was to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra* (1942), at 171.

Congress reiterated in 1943 its intent that the two withholding systems, income tax and social security, should be coordinated:

> "The Senate bill adopts the basic system of collection at source as provided in the House bill but makes a number of technical changes which are explained below. Under the bill as passed by the Senate, the methods of collection, payment, and administration of the withholding tax [on income] were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system." (Conference Report, Current Tax Payment Act of 1943, H.R. Rep. No. 510, 78th Cong. 1st Sess., May 28, 1943 at 28.)

The statutory definition of "wages" that confronted Rowan in the years in suit—1967, 1968 and 1969—

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[9] See also H.R. Rep. No. 2333, 77th Cong., 2d Sess. 126 (1942). As set forth at p. 16, *infra*, the Internal Revenue Service immediately thereafter declared that meals and lodging furnished for the convenience of the employer were not "wages" subject to income tax withholding, and that continues to be its position until the present time.

and that has placed the instant case before this Court is the same as it existed in 1943 and is the same today. Employment taxes were owed by Rowan on "wages" paid by Rowan to its employees, with "wages" defined for income tax withholding purposes in Section 3401 as "all remuneration . . . for services performed by an employee for his employer," and—as recognized by the court below (Cert. App. A, 4a (fn.3), 6a)—defined in essentially identical terms for FICA and FUTA tax purposes in Section 3121 and 3306 as "all remuneration for employment." (App., *infra* p. 2a.) At no time has Congress indicated in any way that, in the absence of specific statutory language, the general term "wages" was to have a different meaning for the several employment taxes. In fact, as recently as 1978, floor debates showed a clear Congressional understanding that an item determined not to be "wages" for income tax purposes was, as a general principle, to be similarly excluded from "wages" for FICA and FUTA tax purposes.[10] In spite of this absence of

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[10] In 1978, Congress amended Section 119 so as to make clear that the exclusion applies to meals furnished an employee for the convenience of the employer, even if the employer imposes a partial charge for the meal. H.R. 12841, 95th Cong., 2d Sess., Section 4, enacted into law as P.L. 95-427. In the consideration of the bill on the floor of the Senate, the following colloquy between Senators Dole and Long occurred (Cong. Rec. S12367 (daily ed. Aug. 2, 1978)):

> "[Mr. Dole]. Madam President, I have one brief question I would like to address to the distinguished floor manager of the bill.
>
> "I have a question regarding section 4 of the bill. Am I correct that to the extent the value of meals and lodging is excluded from gross income, such item also is excluded from the definition of 'wages' for the purpose of income tax with-

statutory change in the definition of "wages" and an unmistakable Congressional intent that the term "wages" has the same meaning for all employment taxes, the Government asserts that it has the authority to treat meals and lodging furnished employees for the convenience of the employer as "wages" for FICA and FUTA tax purposes notwithstanding its recognition that such items are not "wages" for income tax withholding purposes. In evaluating the correctness of this assertion, this Court should be aware of the historical inconsistency in the Government's treatment for FICA and FUTA tax purposes of employer furnished meals and lodging.

B. The Government has recognized that noncompensatory meals and lodging are not "wages" for employment taxes.

As previously noted,[11] immediately after the enactment of the 1935 Social Security Act, the Treasury promulgated Regulations 90 recognizing the applica-

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holding, social security (or FICA) tax, and unemployment (or FUTA) tax?

"Mr. Long. Yes. Due to the special circumstances which the bill addresses, an item excluded from gross income will also be excluded from the definition of 'wages' for all payroll tax purposes, as you have suggested."

Section 4 of P.L. 95-427 makes no changes to the Code other than to Section 119, clearly indicating that under existing law, to the extent an item is excluded from gross income under Section 119, it is understood by Congress that such item is also excluded from "wages" for employment tax purposes. Astonishingly, the court below cites Senator Long's statement as indicating an awareness by "some members of the Congress" that the FICA and FUTA regulations interpreted "wages" differently than the regulations applicable to income tax withholding. Cert. App. A, 10a (fn.10).

[11] See p. 10, *supra*.

bility of the convenience of employer doctrine to unemployment tax (FUTA) "wage" determinations. Such a contemporaneous expression of opinion has been noted by this Court as being "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute," and as such, "entitled to serious consideration." *White* v. *Winchester Country Club,* 315 U.S. 32, 41 (1942). In 1937, the Bureau of Internal Revenue issued S.S.T. 110, 1937-1 Cum. Bull. 440, holding that "supper money" paid an employee who worked overtime for the convenience of the employer did not constitute "wages" for purposes of social security (FICA) and unemployment (FUTA) taxes. Significantly, the Bureau cited as authority for its decision in S.S.T. 110 its previous *income tax* ruling, O.D. 514, 2 Cum. Bull. 90, issued in 1920, which held (though "wages" were within the statutory definition of "income")[12] that "supper money" furnished for the convenience of the employer did not constitute income to the employee for income tax purposes. S.S.T. 192, 1937-2 Cum. Bull. 449, was later issued in 1937 and provided that lunches served employees could constitute "wages" for FICA and FUTA purposes. However, this ruling was superseded the next year by S.S.T. 302, 1938-1 Cum. Bull. 456, which held that, if furnished for the convenience of the employer, such meals would *not* constitute "wages" for FICA and FUTA tax pur-

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[12] See p. 6, *supra.*

poses,[13] citing as authority Reg. 90, Art. 207, *supra;* Reg. 91, Art. 14; and S.S.T. 110, *supra.*

In 1940, prior to the enactment of income tax withholding, Regulations 106 and 107 were issued, in which the Treasury attempted to eliminate the exclusion from "wages" for FICA and FUTA tax purposes, of meals served for the convenience of the employer. Regulations 106, Section 402.227, and Regulations 107, Section 403.227, contained identical language on this point, which, after providing that "facilities or privileges" furnished employees do not ordinarily constitute remuneration for employment, stated:

> ". . . The term 'facilities or privileges,' however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees . . . , since generally these items constitute an appreciable part of the total remuneration of such employees."[14]

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[13] The holding in S.S.T. 302 that FICA and FUTA taxes would not apply referred to the following facts:

> "The M Company has now established that the free lunch privileges are afforded solely to promote its own interests; that the wage scale of its employees has not been lowered to reflect the value of such items; that the lunches are not furnished as additional compensation for services; that such lunches are voluntarily offered to the employees; and that the lunches are furnished for the convenience of the M Company, and benefit the company by promoting the health, good will, and efficiency of its employees."

All of these circumstances apply here to Rowan.

[14] This same language has been in the succeeding regulations to the present time. See Reg. § 31.3121(a)-1(f) (FICA) and Reg. § 31.3306(b)-1(f) (FUTA). These regulations are sometimes referred to as the "facilities or privileges" regulations. Note, however, that as late as 1957, the Service, citing the "facilities or privileges" regulations (relied on by the Court below), upheld the continued validity of S.S.T. 302, applying the "convenience of employer" exclusion for FICA and FUTA tax purposes. Rev. Rul. 57-471, discussed at pp. 17, 33, *infra.*

As was true in the case of the social security and unemployment tax statutory provisions, the income tax withholding provisions of Section 1621 enacted by the Current Tax Payment Act of 1943 did not specifically refer to meals or lodging furnished employees. As previously noted,[15] Congress deliberately chose to use the same tax base of "wages" for income tax withholding as it had used for social security (FICA) and unemployment (FUTA) tax purposes, and to define such term "wages" in essentially identical terms. Regulations 115, Section 404.101, promulgated by the Treasury in 1943, adopted the convenience of the employer test to determine the taxability of meals and lodging for purposes of income tax withholding—as follows:

> "If a person receives as remuneration for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished shall be added to the remuneration otherwise paid for the purpose of determining the amount of wages subject to withholding. If, however, living quarters or meals are furnished to an employee *for the convenience of the employer,* the value thereof need *not* be included as wages subject to withholding." (Emphasis added.)

The inconsistency in the treatment of employee meals and lodging for social security and unemployment tax purposes, as opposed to withholding tax purposes, even though the statutory basis for all three taxes—i.e., "wages"—was identical, was clearly set forth (without explanation for such inconsistency) by the Bureau in 1944 in Mim. 5657, 1944 Cum. Bull. 550, which held

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[15] See pp. 10-11, *supra.*

that although meals served employees for the convenience of their employers were not "wages" for withholding tax purposes, such meals were "wages" for FICA and FUTA tax purposes. Even so, S.S.T. 302, *supra,* issued in 1938, was left standing, which held that meals served employees for the convenience of their employer would *not* constitute wages for FICA and FUTA tax purposes.

The Government's handling of the question was even further confused by the issuance in 1957 of Revenue Ruling 57-471, 1957-2 Cum. Bull. 630, which, in attempting to reconcile S.S.T. 302, *supra,* Mim. 5657, *supra,* and the applicable Regulations, held that although meals served employees of a *bank or trust company* for the convenience of the employer would not constitute "wages" for FICA and FUTA purposes (see S.S.T. 302, *supra*), meals served employees of *food preparation establishments* (such as hotels, restaurants or cafeterias) for the convenience of their employers would constitute "wages" for FICA and FUTA tax purposes. Five years later, the Internal Revenue Service issued Revenue Ruling 62-150, 1962-1 Cum. Bull. 213, which revoked S.S.T. 302, *supra,* stating, without explanation, that although the convenience of the employer test was applicable for income tax purposes, it was "no longer" a test for FICA and FUTA tax purposes.[16] All of these changes in position

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[16] The Government seems to have again reversed its position only a few weeks ago in *Harris Trust & Savings Bank* v. *United States,* 81-1 USTC ¶ 9177 (Ct. Cls., January 16, 1981). In *Harris Trust,* the Treasury assessed FICA and FUTA taxes on the value of meals furnished employees in a company cafeteria in excess of nominal charges made for such meals by the employer. The Government later agreed, however, to the entry of judgment in favor of the

by the Treasury occurred during a period in which there was no change by the Congress in the applicable statutes.

C. The Government has recognized that "wages" has the same general meaning for all employment taxes.

It is also important for this Court to be aware of the Government's prior litigating position, in evaluating the Government's assertion, upheld by the court below, that the Government can override by administrative regulations and rulings the intent of Congress as to the meaning of wages.

Immediately prior to and during the pendency of this case, it was repeatedly recognized by the Government that the term "wages" had the same meaning for all employment tax purposes. In *Royster Co.* v. *United States,* 479 F.2d 387 (C.A. 4th, 1973)—a case which involved all four employment taxes—after specifically referring to the statutory definition of "wages" for FICA, FUTA and income tax withholding pur-

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employer for refund of such taxes based on a statement of facts "expressly accepted as the basis for its concession" which the parties agreed would be incorporated into an order of the court which could be applied for purposes of collateral estoppel to later taxable years. The significant facts as reflected in the court's order in *Harris* are that (1) the meals were provided primarily for the convenience of the employer; (2) there was no agreement with the employees to make such meals available; (3) they got no cash allowances if they refused such meals and were compensated fully for their services by means of ordinary cash wages; (4) they were not expected to render any services during meal times; and (5) the meals were made available on the same basis to all employees regardless of job category or compensation level. All of these circumstances apply to Rowan.

poses, the Government told the Fourth Circuit on brief that:

> "... For purposes of the Federal Insurance Contribution Act and the Federal Unemployment Tax Act, Section 3121(a) and 3306(b), respectively, define 'wages' as 'all remuneration for employment.' For purposes of the collection of income taxes at their source (withholding taxes), Section 3401(a) ... defines 'wages' as 'all remuneration ... for services performed by an employee.' In view of the similarity of these definitions, *we agree with the District Court's conclusion (R. 17) that the term 'wages' has the same meaning for all of the employment taxes involved.*" Gov't Brief, p. 6. (Emphasis added.)

In *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348 (Ct. Cl., 1979), *cert denied,* 444 U.S. 1032 (1980), involving the FICA and FUTA taxability of employee meals furnished for convenience of the employer, the Government sought to rely on the decision of the Seventh Circuit in *Central Illinois Public Service Co.* v. *United States,* 540 F.2d 300 (1976), later reversed by this Court, 435 U.S. 21 (1978), and urged the Court of Claims to suspend its proceedings in *Conquistador,* stating:

> "The Supreme Court's decision in the *Central Illinois* case will by necessity deal with the proper interpretation to be accorded the term 'wages' (i.e., the narrow *Royster* view or the broader *Central Illinois* definition), and as such, will have a direct impact on the instant case. Therefore, the proceedings in the instant case should be suspended pending the Supreme Court's decision in the *Central Illinois* case." [17]

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[17] Gov't. Motion for Suspension of Proceedings, filed Oct. 6, 1977, pp. 2-3.

When the Court of Claims declined to suspend the *Conquistador* proceedings, the Government filed a cross-motion for summary judgment and stated on brief:

> "Because . . . the term 'wages' has the same meaning under all the employment taxes, . . . [the decision of the Court of Appeals in *Central Illinois,* involving income tax withholding on meal reimbursements] is squarely in point here." [18]

The Government went on to state:

> "Because the proper definition of 'wages', and the reconciliation of the conflicting decisions, can be expected from the Supreme Court in *Central Illinois* prior to the Court's consideration of this case, we think any further discussion of this point at this time would be academic." [19]

Additionally, in the instant case, prior to this Court's reversal of *Central Illinois,* the Government advised the court below that *Central Illinois,* as "then pending before the Supreme Court . . . involved 'the same, substantially the same or related issues' as those involved in the present appeal." [20] Against this background, the Government's statement now made to this Court that

> " . . . this Court's decision in *Central Illinois Public Service Co.* does not bear upon the question presented in this case." [21]

cannot be given much credence.

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[18] Gov't Brief in Support of Cross-Motion for Summary Judgment, p. 22, fn. 8.

[19] *Id.* at p. 23.

[20] Gov't Motion for Extension of Time, March 28, 1978, p. 1.

[21] Brief for the United States on Petition for a Writ of Certiorari, p. 9.

III. The Court Below Erred In Finding That The Government Could Vary By Regulation The Meaning Of "Wages."

A. The court below failed to follow decisions of this Court.

The court below held that when Congress uses "the same words . . . in different statutes" [22] the regulatory interpretations of that word by the Government may be inconsistent" [23] and even "conflicting" [24] unless Congress affirmatively acts to prevent such interpretations. (Cert. App. A, 11a.) The court reasoned that the differing definitions could be justified "by the purposes of the statutes, the uses made of their revenues and their relationship with other statutes." (Cert. App. A, 9a.) Both this holding and reasoning of the court below as to the correct interpretation of the term "wages" conflicts with principles stated by this Court in *Social Security Board* v. *Nierotko,* 327 U.S. 358 (1946), and *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21 (1978).

In *Social Security Board* v. *Nierotko,* 327 U.S. 358 (1946), the Government also asserted that it could conclusively determine by regulation what was or was not "wages" for employment tax purposes. This Court refused to accept the Government's attempt to define the word "wages" for social security (FICA) tax purposes as having a meaning different from that ordinarily understood by such term, and held that the validity of regulations issued under the Social Security Act was specifically reserved for judicial determina-

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[22] Cert. App. A, 11a.

[23] *Id.*, 8a.

[24] *Id.*, 7a.

tion. *Id.* at 368. Of specific relevance to the instant case is the following statement by this Court:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. . . . Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretative power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well understood word—'wages'— to indicate the receipts which were to govern taxes and benefits under the Social Security Act." 327 U.S. at 369.

Central Illinois Public Service Co. v. *United States,* 435 U.S. 21 (1978), dealt again with the definitional scope of "wages" for employment tax purposes. The Government argued that "wages" should be defined in "expansive and sweeping" terms and that the payments at issue, lunch payments of $1.40 per meal received by employees pursuant to a collective bargaining agreement,[25] "were a result of the employment rela-

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[25] The circumstances surrounding the furnishing of meals in *Central Illinois* are substantially similar to the facts herein:

> "The employee on travel status rendered no service to the Company during his lunch. He was off duty and on his own time. He was subject to call, however, as were all employees at any time as emergencies required. The lunch payment was unrelated to the employee's specific job title, the nature of his work, or his rate of pay. '[T]his lunch payment arrangement was beneficial and convenient for the company and served its business interest. It saved the company employee time otherwise spent in travelling back and forth as well as the usual travel expenses.' " 435 U.S. at 23.

tionship and were a part of the total of the personal benefits that arose out of that relationship", and therefore necessarily constituted "wages" for purposes of income tax withholding. 435 U.S. at 29.[26] This Court rejected such "expansive and sweeping definition of wages," finding it to be inconsistent with the Congressional purpose of setting forth an "intentionally narrow and precise" standard, chosen by Congress "in the interest of simplicity and ease of administration." 435 U.S. at 29, 31. It was emphasized that the tax base is limited to "wages" and that such term is limited by the withholding statute to mean "all remuneration . . . for services performed by an employee for his employer," 435 U.S. at 29, essentially the identical language of the FICA and FUTA statutes.[27]

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[26] In its brief to the Court of Appeals in *Central Illinois*, the Government stated (p. 10, fn. 4):

> "Normally, the determination that a payment is a *wage* results in the imposition of three distinct taxes: Federal Insurance Conributions Act taxes (Secs. 3111-3126), Federal Unemployment Act taxes (Secs. 3301-3311), and the employees' withheld income taxes (Secs. 3401-3404).
>
> • • •
>
> Only withholding taxes are involved in this case because the Internal Revenue Service made an administrative determination that the employees who received meal money would have, in the vast majority of cases, earned more than $4,800, for 1963. Thus, it was for administrative convenience that no deficiency was asserted as to F.I.C.A. and F.U.T.A. taxes. . . ." (Emphasis added.)

In short, *Central Illinois* only involved income tax withholding because the Government elected not to pursue the FICA and FUTA taxes that would have been due had the Government's definition of "wages" been upheld by this Court.

[27] In reversing the Seventh Circuit in *Central Illinois*, this Court followed the earlier view of *Royster, supra*, 435 U.S. at 31. Al-

Despite its recognition of the essential identity of statutory language, and even acknowledging that "the factors considered in *Central Illinois Public Service* apply here as well", the court below refused to follow this Court's explicit directions as to the proper interpretation of "wages" in light of contrary Government regulations. In view of the Government's repeated acknowledgement of the identity of the issues, and recognition of the Seventh Circuit and the Court of Claims [28] of the applicability of *Central Illinois* to FICA and FUTA tax determinations, the failure of the court below to follow such decision is error.

B. There is no valid precedent for the holding of the court below.

The court below erroneously relied on *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (C.A. 9th, 1943), and *S.S. Kresge Co.* v. *United States,* 218 F. Supp. 240 (E.D. Mich., 1963), and *S.S. Kresge Co.* v. *United States,* 379 F.2d 309 (C.A. 6th, 1967), as supporting the conclusion reached herein.

Pacific American Fisheries involved the characterization for social security tax purposes of board and lodging furnished cannery employees in Alaska during

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though reaching a different conclusion than *Royster* as to whether meal reimbursements were subject to tax, even the Seventh Circuit had itself agreed in *Central Illinois* with *Royster* that "wages" has the same meaning for FICA, FUTA and withholding tax purposes. 540 F.2d at 302, fn. 2.

[28] *Oscar Mayer & Co.* v. *United States,* 623 F.2d 1223, 1225-28 (C.A. 7th, 1980); *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348, 1351-52, 1354 (Ct. Cl., 1979), discussed at pp. 38-41, *infra.*

1937, 1938 and 1939. The employees had been paid wages at the rate of $90 per month and additionally, non-resident employees had been furnished meals "up to the value of $45 per man", plus lodging for time worked. 138 F.2d at 464-465. The Ninth Circuit noted as significant the fact "that some of the workers did not get board and lodging and that such workers received 'more money for the fish and more money for their labor,' " 138 F.2d at 466, and concluded:

> "This differential paid in cash to workers who resided in Alaska and who did not receive board and lodging strongly indicates that board and lodging were part of the wages and not merely for the convenience of the employer." 138 F.2d at 466.

Before reaching this conclusion, however, the court set forth as dictum this observation which the court below found as authority for its conclusion herein:

> " . . . It is possible that what might not be taxable income for income tax purposes might constitute wages under the provisions of the Social Security Act. There are no cases where a similar construction of the term 'wages' as appears in the income tax cases is made in determining wages for Social Security Tax purposes." 138 F.2d at 465.

While this may be literally true, the court ignored S.S.T. 110, 1937-1 Cum. Bull. 440, and S.S.T. 302, 1938-1 Cum. Bull. 456, discussed *supra,* p. 14, which specifically held the "convenience of the employer" test to be applicable to taxes imposed by the Social Security Act. It was unlikely that there would be any *cases* involving the issue so long as it was conceded by the Internal Revenue Service. Furthermore, while the court referred to the "convenience of the employer" test as

being made applicable by regulation for income tax purposes, but not for social security tax purposes, the court inexplicably ignored Regulation 90, Article 207, which specifically made the "convenience of the employer" test applicable for unemployment tax purposes.

In the first *Kresge* case, 218 F.Supp. 240, the question before the District Court was whether optional meals, made available only to those fountain department employees who were willing to wait on customers during their lunch period, constituted "wages" to those employees for FICA and FUTA tax purposes. Employees who were not willing to do so were required either to pay for their meals or eat elsewhere. The meals in question were held by the District Court to be taxable because they "constituted the *quid pro quo* or remuneration for the half hour meal period that the employees made themselves available and for the services they possibly would perform." 218 F.Supp. at 243-244. The District Court concluded:

> " . . . even if the 'convenience of the employer' doctrine applies to F.I.C.A. and F.U.T.A. taxes," the facts of the case at bar clearly do not bring it within such rule." 218 F.Supp. at 244.

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[29] The District Court erred when it cited *Southern Pac. Co.* v. *Joint Council Dining Car Employees*, 165 F.2d 26, 31-32 (C.A. 9th, 1947) as holding that the "convenience of the employer" test was not applicable to a determination of wages under § 3(m) of the Fair Labor Standards Act, 29 U.S.C.A. § 203(m). To the contrary, the Ninth Circuit, while citing the question raised in its earlier decision in *Pacific American Fisheries, supra*, as to whether the "convenience" test applied, held:

> ". . . it does not appear that such additional wage or price was paid primarily as a convenience to the Railway." 165 F.2d at 32.

In affirming the dismissal of the second *Kresge* case (379 F.2d 309) on authority of the first *Kresge* District Court decision, the Court of Appeals did not discuss the merits of the District Court's statement in the first case that the "convenience of the employer" test was inapplicable in FICA and FUTA tax cases. Instead, the Court of Appeals held that under existing FICA and FUTA tax regulations, there was a "presumption" that meals furnished were "generally" a part of "wages" for FICA and FUTA tax purposes, and that the *particular facts* in *Kresge* did not overcome this presumption. 379 F.2d at 310.

Pacific American Fisheries and the two *Kresge* cases, apart from being clearly distinguishable due to the compensatory character of the meals and lodging involved in those cases, fail this Court's mandate expressed in *Central Illinois* as to the proper interpretation of the term "wages". As noted by the Court of Claims in *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348, 1354 (Ct. Cl., 1979), *cert. denied,* 444 U.S. 1032 (1980):

> ". . . [the] 'presumption' of taxability [found by the *Kresge* Court of Appeals] . . . perhaps . . . was impossible to rebut because the court had not been taught to exclude from its analysis the broad and sweeping definition of 'wages', rejected in *Central Illinois.*"

C. The court below failed to recognize that the employee FICA tax is an income tax.

It is important to note when analyzing whether an item can be "wages" for FICA and FUTA taxes when it is admittedly not "wages" for income tax withholding, that the FICA tax imposed on the employee by

Section 3101 is an *income* tax.[30] The court below twice erroneously referred to the FICA tax on employees and employers alike as an "excise" tax (Cert. App. A, 3a, 4a), and the District Court in *Kresge* fell into the same error (218 F.Supp. 240, 243).

Section 801 of the 1935 Social Security Act, entitled (49 Stat. 646) "INCOME TAX ON EMPLOYEES", states:

> "In addition to other taxes, there shall be levied, collected, and paid upon the *income* of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: . ." (Emphasis added.)

The current law, Section 3101(a) of the Internal Revenue Code of 1954 states:

> "In addition to other taxes, there is hereby imposed on the *income* of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—". . . (Emphasis added.)

This Court observed in *Central Illinois* that the concept of "wages" is narrower than that of "income"

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[30] The characterization of this tax was noted by the Court in *Helvering* v. *Davis*, 301 U.S. 619, 635 (1937):

> "Title VIII [social security] as we have said, lays two different types of tax, an 'income tax on employees,' and 'an excise tax on employers.' The income tax on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid 'with respect to having individuals in his employ,' and, like the tax on employees, is measured by wages. Section 804."

(435 U.S. at 25, 29-31), and it would seem clear that if meals and lodging furnished for the convenience of the employer are not income, as conceded by the Government, they necessarily are not "wages" subject to the FICA tax on income.

The mechanism for collecting the employee FICA tax is identical to that used for the income tax, namely, a withholding responsibility placed on the employer. The relevant employee FICA tax withholding provision states:

> "The tax imposed . . . shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." [31]

The relevant income tax withholding provision states:

> ". . . [E]very employer making payment of wages shall deduct and withhold upon such wages a tax . . ." [32]

As a result, the concern expressed by this Court in *Central Illinois* for precision and absence of speculation in determining the scope of the employer's income tax withholding responsibility,[33] is equally applicable to the employer's FICA tax withholding responsibility. The Government and the court below concede that the meals and lodging furnished by Rowan did not consti-

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[31] Section 802(a) of the Social Security Act of 1935 (49 Stat. 636), currently codified as Section 3102(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

[32] Section 1622(a) of the Internal Revenue Code of 1939, as added by the Current Tax Payment Act of 1943 (57 Stat. 126), currently codified as Section 3402(a) of the Internal Revenue Code of 1954.

[33] 435 U.S. at 31-32.

tute income to the employees nor "wages" for purposes of income tax withholding. For the Government to assert, and the court below to find, that these same meals and lodging can nonetheless be income and "wages" so as to impose a withholding responsibility on Rowan for the employee FICA tax, defies logic.

D. The court below erroneously applied the "facilities or privileges" regulations.

The court below found that the meals and lodging in question were to be treated as FICA and FUTA tax "wages" by reason of the "facilities or privileges" regulations (Regulations § 31.3121(a)-1(f) and § 31.3306 (b)-1(f)). Throughout this case, the Government has argued,[34] and the court below implicitly agreed,[35] that these regulations are legislative in nature and therefore entitled to greater weight than ordinary interpretative regulations. To the contrary, the Government's authority to issue regulations relating to FICA and FUTA is derived from Sections 808 and 908 of the Social Security Act which have now been incorporated in Section 7805 of the 1954 Code without any change in meaning or scope.[36] Section 7805 simply authorizes the issuance of "all needful rules and regulations for the enforcement of this Title" (i.e., Title 26, the entire Internal Revenue Code). The authority thus given to the Treasury Department by the Congress to issue regulations with respect to the social security taxes is no different, and no broader, than the *interpretative* regu-

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[34] Gov't Brief to the Court of Appeals, p. 10; Brief for the United States On Petition, pp. 7-8.

[35] Cert. App. A, 5a.

[36] See, H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954).

lation authority of the Treasury Department with respect to the Internal Revenue laws in general."

The court below recognized that the regulations in question are both "conflicting" and "inconsistent" in their definition of "wages." As a result, it is inescapable that such regulations fail the test enunciated by this Court in *National Muffler Dealers Ass'n* v. *United States,* 440 U.S. 472, 488 (1979), that judicial acceptance of a regulation or the commissioner's interpretation of it is dependent upon a showing that it "implement[s] the congressional mandate in some reasonable manner' . . .". See also, *United States* v. *Cartwright,* 411 U.S. 546, 550 (1973). With respect to these regulations the Court of Claims in *Conquistador* stated:

> ". . . [A]s regards food and lodging furnished without charge, [the regulation provides that] they are not 'wages' unless they are 'remuneration,' and the regulation admits that not all food and lodging benefits are 'remuneration'. Only 'ordi-

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[37] In contrast to "interpretative" regulations, "legislative" regulations are issued pursuant to *express* statutory authority and are stated to be binding as a statute if they are (a) within the granted power, (b) issued pursuant to proper procedure and (c) reasonable. See, *Kramertown Co., Inc.* v. *United States,* 488 F.2d 728, 730 (C.A. 5th, 1974), citing K. Davis, *Administrative Law,* Section 503 at 299. Examples of the granting of such "legislative" regulatory authority can be found in I.R.C. Section 38(b), relating to the investment tax credit, *Kramertown Co., Inc.* v. *United States, supra,* Section 217(j), relating to deductible moving expenses, *Goldman* v. *Commissioner,* 497 F.2d 382, 383 (C.A. 6th, 1974), and Section 1502, relating to filing consolidated returns, *Wolter Construction Co., Inc.* v. *Commissioner,* —— F.2d ——, 1980-2 USTC § 9799, 46 AFTR 2d 80-6089 (C.A. 6th, 1980). There is no comparable grant of "legislative" regulatory authority in the employment tax sections pertinent herein. See *Social Security Board* v. *Nierotko,* 327 U.S. 358 (1946), discussed at pp. 21-22, *supra.*

> narily' and 'generally' they are. . . . The employer who concludes subjectively that his free meals are not 'remuneration,' will not find anything in the regulation to tell him whether he is right or wrong on the particular facts of his case. . . . The employer has no way of telling whether or not his plan is the ordinary or general case, except language that seems to intimate the regulator is thinking of rather massive benefits. . . . The concluding part of the quoted regulation would tell him to compare the food or lodging benefits with the 'total remuneration,' but he is not told what ratio will trigger a classification one way or the other; i.e., what part the regulator deems an 'appreciable' part. . . .
>
> "Viewed as a hunting license to authorize IRS agents to flush up additional revenue from employers, the regulation is brilliantly conceived. As a guide to employers in their relations with employees, it is nearly worthless." 597 F.2d at 1353-1354.

The uncertainty engendered by the regulations has been intensified by the fact that the Government has changed its published position on the subjectability to FICA and FUTA taxes of meals served for the convenience of the employer *no less than five times,* notwithstanding the absence of any change whatsoever in the applicable statutes.[38] The regulations and rulings

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[38] Compare Regulations 90, Article 207 (1936) (meals for the convenience of the employer *not* treated as wages); S.S.T. 110, 1937-1 Cum. Bull. 440 (same); S.S.T. 192, 1937-2 Cum. Bull. 449 (such meals treated as wages); S.S.T. 302, 1938-1 Cum. Bull. 456 (such meals *not* treated as wages); Regulations 106, § 402.227, and Regulations 107, § 403.227 (1940) (such meals "ordinarily" treated as wages); Mim. 5657, 1944 Cum. Bull. 550 (such meals treated as wages); Rev. Rul. 57-471, 1957-2 Cum. Bull. 630 (such meals served bank employees *not* treated as wages, such meals served other employees treated as wages); and Rev. Rul. 62-150, 1962 Cum. Bull. 213 (meals generally treated as wages).

interpreting the FICA and FUTA statutes are inconsistent and for that reason alone fail the test of "continuity without substantial change" regarded by this Court as essential in order that they be considered as having Congressional approval and the effect of law. *United States* v. *Correll,* 389 U.S. 299, 305-06 (1967), cited by the court below, Cert. App. A, 10a-11a. Off and on for approximately 26 years, from the issuance of Regulations 90 in 1936, followed by S.S.T. 302, *supra,* until its revocation without explanation in Rev. Rul. 62-150, *supra,* the Government specifically recognized the convenience of the employer test as being applicable to a determination of FICA and FUTA "wages." As late as 1957, the Government stated in Revenue Ruling 57-471, *supra,* that the convenience test applied so as to exclude from FICA and FUTA "wages" meals served employees of a bank or trust company. Yet from 1940 on, the language of the "facilities or privileges" regulations, found by the court below to preclude the convenience test, has been substantially unchanged, a fact that calls into serious question both the validity of the Government's present position and the decision of the court below as to the applicability and controlling effect of these regulations. This inconsistency between the regulations and the rulings also provides considerable basis for the Court of Claims' observation in *Conquistador* that "[a]s a guide to employers in their relations with employees, [the regulations are] nearly worthless." 597 F.2d at 1354.

E. The court below erroneously ignored other, applicable regulations.

The holding of the court below fails to take into account other regulations that are directly in point and which compel a contrary conclusion as to the treat-

ment of meals and lodging "furnished in kind by an employer for his own benefit to employees away from home overnight." [39]

FICA Regulation § 31.3121(a)-1(h) and FUTA Regulation § 31.3306(b)-1(h) provide:

> "Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages."

The income tax withholding regulation contains identical language. See Reg. § 31.3401(a)-1(b)(2), App., *infra*, p. 5a.

The Internal Revenue Service has recognized that expenses incurred directly by an employer which, if paid by his employees would be deductible by such employees as ordinary and necessary travel expenses, "are not 'wages' for purposes of Federal employment taxes," specifically including FICA, FUTA and income tax withholding. Rev. Rul. 76-71, 1976-1 Cum. Bull. 308.[40]

Under Section 162(a)(2) of the Internal Revenue Code a deduction is allowed for

> "[T]raveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circum-

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[39] See Cert. App. A, 1a.

[40] It is not clear why the Internal Revenue Service is willing to recognize the non-FICA and FUTA taxability of such items solely on the basis that such items would be deductible by the employee, but would not do so here when the meals and lodging at issue have the exact same income tax effect to the employee.

> stances) while away from home in pursuit of a trade or business."

In justifying deductions under this section for expenses overnight, this Court has pointed out that "the statute speaks of 'meals and lodging' as a unit," and that an employee gains only limited benefit from such expenses if he must also "maintain a home for his family at his own expense even when he is absent on business." *United States* v. *Correll,* 389 U.S. 299 at 304-305. The principle of allowing a deduction (or exclusion if the expense is paid directly by the employer) is particularly applicable here where as a matter of practical necessity, an employee working offshore, cannot return home at night until his 10-day tour ends, but must nevertheless in the meantime, maintain living quarters on shore available for use between tours.[41] See, in this connection, Revenue Rulings 54-497, 1954-2 Cum. Bull. 75; 75-432, 1975-2 Cum. Bull. 60; and 75-168, 1975-1 Cum. Bull. 58, applying such principle to railroad employees eating and sleeping aboard trains and truck drivers on long-haul overnight trips. Thus, the meals and lodging furnished Rowan's offshore employees are properly excludible from "wages" for FICA and FUTA tax purposes by Regulations § 31.3121(a)-1(h) and § 31.3306(b)-1(h) and Revenue Ruling 76-71, *supra,*—regardless of what the "facilities or privileges" regulations (Reg. §§ 31.3121(a)-1(f) and 31.3306(b)-1(f)) relied on by the court below might seem to say.

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[41] Although paid substantially the same cash wages as crew members on offshore rigs, crew members on Rowan's land-based rigs, who went home each day, were not furnished meals or lodging (J.A. 69a-70a, 47a-48a, 53a).

F. The decision of the court below allowing "inconsistent" and "conflicting" interpretations of "wages" is erroneous.

The reasoning of the court below that, in the absence of a specific Congressional prohibition, the Government is free to interpret the term "wages" "inconsistent[ly]" and "conflicting[ly]" as between various sections of the Internal Revenue Code is error because it fails to take into account a clear Congressional intent that "wages" be construed the same for all employment taxes.[42]

As was noted previously,[43] the Congressional purpose in using the term "wages" was to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra* (1942), at 171.

The court below disregarded this statement of Congressional purpose, and stated:

> "Ease of administration and uniformity of interpretation, even if not icons, merit consideration. Yet most businesses *today* utilize computers to calculate taxes and it is a simple matter to devise a program that includes some items for one or two taxes and excludes the same items in calculating others." Cert. App. A, 11a. (Emphasis added.)

In this regard, it is appropriate to note that in the taxable years here involved—1967, 1968, and 1969—far fewer employers had computers to calculate taxes than today, and many still do not. But, more important,

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[42] See pp. 10-11, *supra*.

[43] See p. 11, *supra*.

there were no computers for calculating taxes in 1942 when Congress deliberately chose the same word "wages" as the base for all employment taxes; whether Congress would have made the same decision today is irrelevant in light of the fact that it has never seen fit to overturn that decision, and its intent in enacting the statute should be given primary weight in applying the statute.

It is also clear that great difficulty will be encountered in determining the value of meals and lodging, placing an extremely heavy burden on the employer if it is to be fair to individual employees in determining the amounts on which the employee FICA tax must be withheld and the employer FICA and FUTA taxes paid.[44] Again, in describing income tax withholding, the Conference Report in 1943 said in referring to the bill which Congress adopted:

> ". . . [T]he methods of collection, payment, and administration of the withholding tax were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system." H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943), at 28.

The decision of the court below, allowing the Government to define "wages" with "inconsistent" and "con-

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[44] Aside from the problem of determining the value of food and lodging furnished under conditions where commercial facilities are totally unavailable, it should be noted that over the course of the year some employees may eat entirely different items and entirely different quantities than other employees; some may sometimes bring their own food; and some may follow different practices some days than others.

flicting" meanings places unwarranted and unjustifiable burdens on the administration of the employment tax system.

IV. The Courts Of Appeals For The Fourth And Seventh Circuits And The Court Of Claims Have Correctly Decided The Issues In This Case.

The court below recognizes that its decision permitting the Government to vary by regulation the definition of "wages" is directly contrary to the recent decisions of the Fourth Circuit in *Royster Co.* v. *United States,* 479 F.2d 387 (1973), and the Seventh Circuit Circuit in *Oscar Mayer & Co.* v. *United States,* 623 F.2d 1223 (1980), which both held that "the term 'wages' has the same essential meaning in the [income tax] withholding, FICA and FUTA tax statutes." (Cert. App. A, 8a, 11a.)

The court below also recognizes that its decision conflicts with the holding of the Court of Claims in *Hotel Conquistador Inc.* v. *United States,* 597 F.2d 1348 (1979), *cert. denied,* 444 U.S. 1032 (1980), that cafeteria meals furnished hotel employees for the convenience of the employer were not remuneration and therefore not "wages" for FICA and FUTA tax purposes (Cert. App. A, 11a).

Royster, as discussed previously,[45] is initially significant because of the concession by the Government on brief in that case that "the term 'wages' has the same meaning for all of the employment taxes involved." *Royster* involved the question of whether meal reimbursements constituted "wages" to employees for purposes of FICA, FUTA, and income tax withholding.

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[45] See p. 18, *supra.*

Quoting the definition of "wages" contained in the FICA, FUTA and withholding statutes, the Fourth Circuit stated:

> "§ 3121(a) defines 'wages' within the meaning of §§ 3101 and 3102 as 'all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.' Concerning FUTA, 26 U.S.C. § 3306(b) likewise defines 'wages' as 'all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.' For the purposes of withholding income tax by the employer, 26 U.S.C. § 3401(a) defines wages: 'For purposes of this chapter, the term 'wages' means all remuneration for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash.' The district court was properly of opinion that the slight variations in the wording of the above statutes were inconsequential and that wages has the same essential meaning under all the statutes here in question. The government in its brief agrees with this determination.
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> * * *
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> "We are of opinion that the term wages is narrower than the term income as used in the income tax provisions relating to how an individual must treat payments to him. Wages are merely one form of income.
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> * * *
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> "We believe that the question here is whether the payments at issue were made to the employees of Royster as remuneration for services performed.
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> * * *
>
> "We conclude, therefore, that the payments in question here were not wages as that term is used

in the FUTA and FICA and income tax withholding statutes." [46] 479 F.2d at 390, 392.

In *Oscar Mayer,* the Seventh Circuit had before it the question of whether the unreimbursed value of the personal use of company cars by employees constituted "wages" for purposes of FICA and FUTA taxes. The Government had conceded that such personal use value was not "wages" for income tax withholding purposes but contended that such value was nevertheless "wages" for FICA and FUTA purposes. In reliance on this Court's approval of the Fourth Circuit's decision in *Royster,* 623 F.2d at 1226, the Seventh Circuit denied the Government's attempt to treat such an item inconsistently for employment tax purposes, stating:

> "The seemingly inconsequential differences in statutory language belie an assertion that Congress intended to adopt broad policy differences in establishing the various withholding programs. Since there has been no showing by the Government to the contrary, we conclude that Congress' use of

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[46] The suggestion by the Government in its Brief on Petition for a Writ of Certiorari herein (p.10, fn.9) that the *Royster* decision was based on an analysis of IRS regulations other than those relied on herein is completely without foundation. The analysis in the opinion of the District Court (342 F. Supp. 375 at 376), in the Government brief referred to by the court (Gov't Brief, p.6), and in the opinion of the Court of Appeals (479 F.2d at 390) is in each instance based entirely on the language of the statutes without any mention of such "other" regulations. The only regulations even referred to in the Government's brief in *Royster* are the *same* "facilities or privileges" regulations it relies on here. (Gov't Brief, pp. 7-8, 23-24).

> the term 'wages' in both contexts reflects an intent that the term be construed for FICA and FUTA purposes congruently with the manner *Central Illinois* prescribes for the income tax provisions." 623 F.2d at 1227.

The decision of the Court of Claims in *Hotel Conquistador,* holding that meals furnished employees for the convenience of their employer were not "wages" for FICA and FUTA tax purposes, has been previously before this Court on the Government's petition or a writ of certiorari, denied at 444 U.S. 1032 (1980). The Court of Claims found that such meals did not constitute "remuneration" to the employees and therefore could not be "wages", 597 F.2d at 1350, a finding based on the analysis of the court as to whether the employer furnished the meals "primarily to effectuate his own policies or to sweeten the pot for employees," 597 F.2d at 1353. The court refused to accept the Government's assertion that the "facilities or privileges" regulations relied on by the court below compelled a contrary conclusion. 597 F.2d at 1353-1354.

Royster, Oscar Mayer, and *Hotel Conquistador* were correctly decided by their courts and reflect a clear understanding of the teaching of this Court in *Central Illinois* that the term "wages" is an even narrower tax base than "income" and of the clearly expressed Congressional intent that such term be consistently construed for all employment taxes. The acknowledged failure of the court below to follow the holdings and rationale of those cases is error.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.) (1971):

SECTION 3101. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

• • •

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) —

• • •

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement* — The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. . . .

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SECTION 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance* —

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

• • •

(b) *Hospital Insurance* — In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) —

• • •

SECTION 3121. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

• • •

SECTION 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

• • •

SECTION 3306. DEFINITIONS.

(b) *Wages* — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

• • •

SECTION 3401. DEFINITIONS.

(a) *Wages* — For purposes of this chapter, the term "wages" means all remuneration (other than fees paid

to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; . . .

• • •

SECTION 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding* — Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. . . .

• • •

Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.) (1971):

§ 31.3121(a)-1 *Wages.*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

• • •

(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reason-

ably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • •

§ 31.3306(b)-1 *Wages*

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

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(h) Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • •

§ 31.3401(a)-1 *Wages*

(b) *Certain specific items* —

(2) *Traveling and other expenses.* Amounts paid specifically — either as advances or reimbursements — for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

• • •

(9) *Value of meals and lodging* — The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119-1 of this chapter (Income Tax Regulations).

• • •

No. 80-780

MAR 31 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether meals and lodging furnished on a regular basis by petitioner without charge to its employees while they were working on offshore oil rigs constituted "wages" for social security (FICA) and federal unemployment insurance (FUTA) tax purposes, in accordance with the governing Treasury Regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-780

ROWAN COMPANIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court (Pet. App. 13a) is not reported. The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 624 F.2d 701.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1980 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 14, 1980, and granted on January 19, 1981 (J.A. 141a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 119, 3111, 3121(a), 3306(b), and 3401 of the Internal Revenue Code of 1954 (26 U.S.C.), and Section 209 of the Social Security Act (42 U.S.C. 409) are set forth at Appendix, *infra*, 1a-4a.[1] The relevant portions of Section 404.1043 of the Social Security Regulations (20 C.F.R.), and of Sections 31.3102-1(a), 31.3121(a)-1(f), Section 31.3306(b)-1(f), and Section 31.3401(a)-1 of the Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.), are set forth at Appendix, *infra*, 4a-9a.

STATEMENT

1. During the years in issue (1967-1969), petitioner contracted with other companies to drill oil and gas wells both on land and beneath offshore waters (Pet. App. 2a-3a; J.A. 5a-6a, 9a-10a, 22a, 42a, 73a-74a, 80a-86a). When drilling offshore, petitioner would move its rig to the owner's location, which was often as much as 60 miles from land. The rig was operated by a drilling crew that typically included from four to twelve persons. Each offshore rig operated 24 hours a day and was manned by two crews, each of which worked a 12-hour shift. Members of a crew usually remained offshore for a ten-day tour of duty aboard the rig, followed by a five-day period of leave. When a crew's new tour commenced, it re-

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[1] Section 3121(a) is derived from Section 811(a) of the Social Security Act of 1935, ch. 531, 49 Stat. 639, and is now part of the Federal Insurance Contribution Act (FICA). Section 3306(b) is derived from Section 907(b) of the Social Security Act of 1935 (ch. 531, 49 Stat. 642), and is now part of the Federal Unemployment Tax Act (FUTA).

ceived transportation to the offshore location (Pet. App. 2a; J.A. 46a-48a, 59a).

Because of the high cost of transporting crews to and from land at the beginning and end of each shift,[2] petitioner engaged a caterer to provide meals and maintain living quarters for crews working offshore. The meals and lodging cost petitioner about $6 per day per employee (J.A. 31a-32a, 106a). A rig employee typically earned about $29 per day in cash wages.[3] The eating facilities, sleeping quarters and lounge areas used for leisure activities while a crew was off duty were usually located on a vessel moored alongside the drilling platform (Pet. App. 2a; J.A. 50a, 59a-62a, 120a-121a, 140a).

Petitioner's policy to provide meals and lodging to its offshore rig employees was unilateral and prompted by considerations of economy. It was not a result of either individual or collective bargaining. Petitioner furnished identical meals and facilities on a regular basis to all employees working offshore regardless of their status or rate of pay. An employee who for any reason did not elect to eat meals furnished did not receive an allowance in lieu of the meals (Pet. App. 2a; J.A. 125a-126a, 139a).

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[2] The cost of providing transportation to shore at the beginning and end of each shift would have been $275 to $350 per day for each crew, or approximately $25 per man (J.A. 136a). Although the court of appeals indicated (Pet. App. 2a) that petitioner provided rig-to-shore transportation for its employees, the record indicates that this expense was usually borne by the oil companies with which petitioner contracted (J.A. 75a-76a, 81a, 84a).

[3] An employee earning $2.06 per hour (J.A. 28a) would earn $28.84 for a 12-hour shift, computed with four hour's overtime at a time-and-a-half rate.

Petitioner did not include the value of the meals and lodging in the employees' wages base for purposes of computing (1) the amount of old-age, survivorship, and disability (FICA) taxes to be paid by it and its employees, and (2) the amount of unemployment insurance (FUTA) taxes to be paid by it (J.A. 6a, 9a). Upon examination of petitioner's tax returns for 1967-1969, the Internal Revenue Service added the fair value of the meals and lodging ($6 per day) to the FICA and FUTA wages bases of the offshore rig employees (J.A. 12a-15a).[4] After paying the resulting additional assessments,[5] petitioner

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[4] The Service did not include the value of the meals and lodging in the employees' wages base for income tax withholding purposes because it determined that these personal benefit items were extended to the employees for petitioner's convenience and were therefore excludable from the employees' gross income under Section 119 of the Internal Revenue Code of 1954. Section 119 provides that an employee's gross income does not include the value of employer-furnished meals or lodging furnished for the convenience of the employer on the employer's premises as long as the employee is required to accept the lodging provided. Because the value of such meals and lodging was excluded from gross income, it was not part of the employees' "wages" base for purposes of income tax withholding. Section 31.3401(a)-1 (b)(9) of the Treasury Regulation on Employment Tax (26 C.F.R.), specifically excludes from "wages," for purposes of computing income tax withholding, amounts that are not included in an employee's gross income. There are no similar exclusions in the FICA and FUTA Regulations.

[5] The amount at issue in this case totals $35,198.46, plus interest (J.A. 7a). We are advised by the Internal Revenue Service that the total value of the meals and lodging provided by petitioner was approximately $265,000. Since a typical employee earned about $29 per day in cash wages and the meals and lodging cost petitioner about $6 per day per employee, the non-cash remuneration approximates 17% of the employees' total compensation.

brought this refund suit in the United States District Court for the Southern District of Texas (Pet. App. 3a; J.A. 5a-7a). The district court granted summary judgment for the government (Pet. App. 13a).

2. The court of appeals affirmed (Pet. App. 1a-12a). It first observed that the term "wages" for purposes of FICA and FUTA is broadly defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." See 26 U.S.C. 3121(a), 3306(b). The court then noted that since 1940, the Commissioner's Regulations have excluded from wages facilities or privileges of relatively small value furnished employees by the employer, but have included meals or lodging of appreciable value furnished to seamen or other employees aboard vessels. See Treasury Regulations on Employment Tax, Sections 31.3121(a)-1 (f), 31.3306(b)-1(f) (26 C.F.R.) (Pet. App. 4a-5a).

The court of appeals upheld the Commissioner's Regulations as consistent with the statute. In so ruling, the court followed similar decisions upholding the includability of meals and lodging under FICA and FUTA in *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (9th Cir. 1943); and *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967) (Pet. App. 6a). The court noted that such meals and lodging furnished for the convenience of the employer are excluded from "wages" for purposes of income tax withholding, but held that this exclusion does not in any way qualify the FICA and FUTA definition of wages. The court of appeals accordingly found *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), to be inapplicable. There, this Court held that an employer's reimbursement for lunch expenses of employees was not "wages" subject

to income tax withholding. The court of appeals explained that "a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payment to employees, it is unnecessary to withhold taxes from these payments" (Pet. App. 7a).

In so ruling, the court of appeals acknowledged that its decision conflicted with *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct. Cl. 1979), cert. denied, 444 U.S. 1032 (1980), and *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980), which respectively held that the value of meals furnished hotel and restaurant employees and of company cars furnished to employees at far below-cost for personal use are not "wages" for purposes of FICA and FUTA. However, the court rejected the central premise of the Court of Claims and the Seventh Circuit in those cases, *viz.* that if an item is excludable from "wages" for income tax withholding purposes, it is likewise excludable for FICA and FUTA tax purposes. The court below accordingly was "unable to subscribe to [the] conclusion * * * that the same words used in different statutes must mean the same thing and that, therefore Congress intended to deny interpretative power to the Secretary" (Pet. App. 11a).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the meals and lodging petitioner furnished its offshore rig employees are includable in their "wages" for purposes of the social security (FICA) and unemployment insurance (FUTA) taxes.

Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954 (26 U.S.C.) broadly define

"wages" for purposes of FICA and FUTA tax provisions as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." In enacting the social security taxes, Congress intended to impose the excises on a broad range of employer-furnished remuneration. The Committee Reports state that wages include compensation for services paid in any form, such as "room" and "board." Because the purpose of the Social Security Act was "to reduce destitution and dependence," the "wages" base was defined in expansive terms in order to vindicate the important social goals of the legislation. H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 2 (1935).

Accordingly, since 1940, the FICA and FUTA Regulations have defined "wages" to mean "all remuneration for employment," even if such remuneration is furnished for the "convenience of the employer" and is thereby excluded from gross income under Section 119 and from "wages" for federal income tax withholding purposes under Section 3401 of the Internal Revenue Code of 1954 (26 U.S.C.). The fact that the term "wages" is used in the statutes for FICA, FUTA, and income tax withholding does not, as petitioner contends, require the conclusion that "wages" has the identical meaning under the three statutes. As the court of appeals correctly explained (Pet. App. 7a), "a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments." Moreover, the fact that items of compensation may be includable in the "wages" base for FICA and FUTA tax purposes

even though excludable from gross income for income tax purposes is consistent with the broad social welfare goals of the Social Security program. See *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946); *United States* v. *Silk*, 331 U.S. 704 (1947).

The question in this case is controlled by Treasury Regulations that explicitly provide for the inclusion in FICA and FUTA wages of "the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen aboard vessels" (26 C.F.R. 31.3306(b)-1(f)). These Regulations were promulgated pursuant to specific statutory language and congressional delegation of authority, are consistent with the legislative history, and have stood substantially unchanged for 40 years. During this period, the Ninth Circuit upheld the inclusion of the value of employer-furnished meals in FICA and FUTA (*Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (1943)) and Congress then reenacted the statute. The fact that for a brief earlier period (1936-1940) the FUTA Regulations had provided for the exclusion of the value of such meals does not cast doubt upon the validity of the Regulations that have governed the employment tax area for more than 40 years, or the application of the Regulations to employers such as petitioner. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 484-485 (1979). Since the Regulations are reasonable and consistent with the statute, they are entitled to great deference and should be upheld. *Commissioner* v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981), slip op. 12, and cases cited therein.

2. This Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), does not bear upon the question presented in this case. There, the Court held that an employer's reimburse-

ment for 1963 lunch expenses of employees on non-overnight company travel did not constitute "wages" subject to withholding by the employer within the meaning of Section 3401(a) of the Internal Revenue Code of 1954.

But *Central Illinois Public Service Co.* turned on the fact that the pertinent Treasury Regulations excluded from the concept of wages, for purposes of *income* tax withholding, amounts paid for all travel or other business expenses, without regard to whether the travel was away from home overnight. In these circumstances, the Court was reluctant to impose secondary tax liability on the employer by retroactively applying the overnight rule of *United States* v. *Correll*, 389 U.S. 299 (1967), to the year 1963 when "not one regulation or ruling required withholding on any travel expense reimbursement" (435 U.S. at 32).

Here, in marked contrast, the Treasury Regulations and the published rulings extant during the yeras at issue unambiguously require the inclusion of all meals (and lodging) of appreciable value in the FICA and FUTA "wages" tax base. The Court of Claims in *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (1979), cert. denied, 444 U.S. 1032 (1980), and the Seventh Circuit in *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (1980), therefore erred in concluding that *Central Illinois Public Service Co.* undermined the authoritative force of the governing Treasury Regulations. As the court below succinctly put it in similarly distinguishing *Central Illinois Public Service Co.*, "[t]he factors considered [in that case] * * * do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations, is invalid" (Pet. App. 10a; footnote omitted).

ARGUMENT

THE VALUE OF MEALS AND LODGING REGULARLY FURNISHED BY AN EMPLOYER TO ITS EMPLOYEES WITHOUT CHARGE IS INCLUDABLE AS "WAGES" UNDER THE SOCIAL SECURITY AND FEDERAL UNEMPLOYMENT INSURANCE TAX ACTS

A. The Treasury Regulations Require the Inclusion of Employer-Furnished Meals and Lodging in Taxable "Wages" For Purposes of Social Security and Unemployment Insurance

This case presents an important question, on which the lower courts have divided, concerning the scope of the "wages" tax base for purposes of social security and unemployment insurance under the Federal Insurance Contributions Act (FICA), and the Federal Unemployment Tax Act (FUTA).

Congress has defined "wages" for purposes of the FICA and FUTA tax provisions as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." Given this broad definition, it is beyond dispute that employer-furnished meals and lodging fit comfortably within the statutory formulation. But we do not rest our case for includability on a statutory construction of our own making. As we shall show in greater detail (pages 17-22, *infra*), the case for includability is squarely supported by Regulations that have been extant for more than 40 years and are therefore well known to affected employers such as petitioner. Moreover, the Regulations have stood virtually unchanged during several reenactments of the statute. In these circumstances, "[t]he role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations

fall within his authority to implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S. 299, 307 (1967).

Here, the court of appeals upheld the validity of longstanding governing Treasury Regulations, in ruling that the value of meals and lodging furnished by petitioner without charge to its employees on a regular basis while they were working on offshore oil rigs constituted "wages" for social security (FICA) and federal unemployment insurance (FUTA) tax purposes. There is no room for debate on whether the Regulations in question are applicable to the facts of this case. They require that, for social security and and unemployment tax purposes, the value of meals or lodging furnished by an employer ordinarily constitutes taxable "wages." Moreover, the requirement of includability is specifically directed to the precise facts of this case. For purposes of FICA, Treasury Regulations Section 31.3121(a)-1(f) (26 C.F.R.), and its counterpart for purposes of FUTA, Section 31.3306(b)-1(f) (26 C.F.R.), prescribe the inclusion in "wages" of "the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the remuneration of such employees." If, as we submit, the Regulations are a reasonable interpretation of the statute, that is the end of the matter and the decision below should be affirmed. Thus, the question before the Court necessarily turns on the Secretary's authority to issue such Regulations interpreting the statutory term "wages" to include meals and lodging furnished by an employer in these circumstances.

The existence of controlling Treasury Regulations requiring the includability of meals and lodging imposes a heavy burden on petitioner who seeks to

exclude such compensation from the FICA and FUTA tax. It must show that the Regulations are unreasonable and plainly inconsistent with the statute. In our view, it has done neither. As a unanimous Court reaffirmed only this Term in *Commissioner* v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981), slip op. 12, with respect to the substantial weight to be given such Regulations—

> These regulations command our respect for Congress has delegated to the Secretary of the Treasury, not to this Court, the task of "administering the tax laws of the Nation." *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973); accord, *United States* v. *Correll*, 389 U.S. 299, 307 (1967); see 26 U.S.C. § 7805(a). We therefore must defer to Treasury Regulations that "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S., at 307; accord, *National Muffler Dealers Assn.* v. *United States*, 440 U.S. 472, 476-477 (1979). To put the same principle conversely, Treasury Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); accord, *Fulman* v. *United States*, 434 U.S. 528, 533 (1978); *Bingler* v. *Johnson*, 394 U.S. 741, 759-761 (1969).

See also *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 533 n.11 (1979).

Indeed, the Court's customary deference to Treasury Regulations is particularly appropriate in this case because the Regulations at issue were promulgated pursuant to specific congressional delegations of authority to deal with the "limitless factual vari-

ations" (*United States* v. *Correll, supra*, 389 U.S. at 307) in the area of employee compensation. Hence, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments" (*Commissioner* v. *Stidger*, 386 U.S. 287, 296 (1967)) and to promulgate rules applying statutes of general application to specific situations. We turn now to a discussion of the statutory and administrative history of the question which we believe demonstrates that the Commissioner's Regulations here fall well within his authority to interpret the statute in a reasonable manner consistent with the congressional mandate.

B. The Treasury Regulations Properly Implement Congress' Intent to Include Employer-Furnished Meals and Lodging in Taxable "Wages" under FICA and FUTA

1. Sections 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.) impose employment taxes upon employers based upon the amount of "wages" paid to their employees. Section 3101 of the Code also imposes an employment tax on the "wages" of each individual employee. That tax is withheld and remitted to the government by the employer (Treasury Regulations on Employment Tax (1954 Code), Section 31.3102-1(a) (26 C.F.R.), Appendix, *infra*, 6a). Both of these taxes were enacted in 1935 as part of the Social Security Act, ch. 531, 49 Stat. 620, in order to provide old-age, survivorship, disability, and unemployment benefits to workers. In 1954, the old-age, survivorship and disability taxes were codified as the Federal Insurance Contribution Act (FICA) (26 U.S.C. 3101 *et seq.*); the unemploy-

ment taxes (Section 3301 *et seq.*) were likewise codified as the Federal Unemployment Tax Act (FUTA).[6]

The employee's "wages" constitute the base for the FICA and FUTA taxes under Sections 3121(a) and 3306(b) of the Code, and for old-age, survivorship and disability (OASDI) benefits under Title II of the Social Security Act (42 U.S.C. 401 *et seq.*) (see *United States* v. *Silk*, 331 U.S. 704, 711 (1947)). Under Title II, the Internal Revenue Service regularly reports to the Social Security Administration the amount of each employee's "wages" on which taxes have been paid. These reported amounts serve as the basis for computing each employee's old-age, survivorship, and disability benefits.

Under the identical Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 209 of the Social Security Act (42 U.S.C. 409) (Appendix, *infra*, 4a), "wages" are defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." Sections 3101 and 3111 (Appendix, *infra*, 2a) impose the FICA taxes on employers and employees with respect to stated percentages of the employees' "wages."[7] During the years

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[6] The old-age and disability tax provisions of Title VIII of the Social Security Act of 1935, and the unemployment compensation tax provision of Title IX of the Act, were recodified as Chapter 9 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)). H.R. Rep. No. 6, 76th Cong., 1st Sess. 3-4 (1939). These Social Security taxes were then incorporated into Subtitle C of the Internal Revenue Code of 1954, 26 U.S.C. 3101 *et seq.*, as the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

[7] The FICA tax was originally imposed on the first $3,000 of each employee's annual wages. Section 811 (ch. 531, 49 Stat. 639). As of 1980, the tax was imposed on the first

at issue, Section 3306(b) imposed the FUTA tax on employers with respect to the first $3,000 of "wages" paid to an employee.[8]

In enacting these employment taxes, Congress intended to impose the excises on a broad range of employer-furnished remuneration in order to accomplish the exigent social purposes of the Social Security Act. *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937). As the Committee Reports state (H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935))[9]:

> The need for legislation on the subject of social security is apparent at this time. On every hand the lack of such security is evidenced by human suffering, weakened morale, and increased public expenditures.
>
> * * * We must relieve the existing distress and should devise measures to reduce destitution and dependency in the future.

Recent increases in the employment tax rates and maximum wage base and public discussion concerning the solvency of the social security trust fund confirm with emphatic urgency the importance of the employment excise taxes in funding for the benefits under the Social Security Act. As this Court stated in

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$25,900 of annual wages. In 1981, the tax and benefit base was increased to $29,700. Pub. L. No. 95-216, Section 103 (b)(2), 91 Stat. 1513.

[8] Originally, the FUTA unemployment tax was imposed on the entire year's wages. Sections 901, 907 (ch. 531, 49 Stat. 639, 642). As of 1978, the tax is imposed on the first $6,000 of annual wages. Pub. L. No. 94-566, Section 211(a), 90 Stat. 2676.

[9] H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 2 (1935). See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

United States v. *Silk*, 331 U.S. 704, 711 (1947), "[The] relationship between the tax sections and the benefit sections emphasizes the underlying purpose of the legislation—the protection of its beneficiaries from some of the hardships of existence." Hence, the Court recognized that "As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation * * * would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation (footnote omitted)" (*id.* at 712).

The Court has therefore consistently construed the Social Security Act to ensure that all forms of compensation are included in taxable "wages." Thus, in *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), the Court held that the Social Security Act should be liberally construed to include a back pay award in the wages base, even though the affected employee had not worked during the period to which the back pay related. In addressing the statutory definition of "employment" as "any service, of whatever nature, performed within the United States by an employee for his employer," the Court concluded that *id.* at 365-366 " 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer [footnote omitted]."

The broad statutory definition of "employment" and "service" on which the Court relied in *Nierotko* to vindicate the goals of the Social Security Act, is likewise reflected in Congress' plainly stated intention to include in the tax and benefit base a broad

range of personal benefit items, provided without charge by an employer to its employees, where such benefits arise out of the employer-employee relationship.[10] Thus, the pertinent committee report (H.R. Rep. No. 615, *supra*, at 32) explicitly stated that "Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, *such as room, board, etc.*" (emphasis supplied). See also S. Rep. No. 628, *supra*, at 49.

2. a. Since 1940, the Treasury Regulations under FICA and FUTA have consistently implemented Congress' intention to include all forms of non-cash remuneration in the wage tax base. Those Regulations have defined "wages" to mean "all remuneration for employment," even if such remuneration is furnished in the form of meals and lodging for the "convenience of the employer" and might therefore be excludable from wages for federal income tax withholding purposes under Sections 119 and 3401 of the Internal Revenue Code of 1954 (26 U.S.C.) Appendix, *infra*, 1a, 4a.[11] The OASDI Regulations issued since

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[10] Petitioner (Br. 17-18) cites *Nierotko* as a case where this Court held "invalid" a Social Security Regulation which excluded back pay from taxable "wages." But no Regulation was involved in *Nierotko*. The Social Security Board's position rested on a 1942 "minute" of the Board, which in turn relied upon a 1937 "Office Decision" of the Bureau of Internal Revenue and a court decision holding that back pay awards were not triable by a jury (see 327 U.S. at 367-370). There can be little doubt these authorities were entitled to far less deference than the Regulations involved here.

[11] See S.S.T. 386, 1940-1 Cum. Bull. 211; Mim. 5657, 1944 Cum. Bull. 550; and Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, all explaining Treas. Reg. 106, § 402.227 (1940) (FICA) and Treas. Reg. 107, § 403.227 (1940) (FUTA). These 1940 FICA Regulations were carried forward substantially un-

1940 by the Social Security benefit agencies are to the same effect.[12] All of these Regulations specify that, for Social Security tax and benefit purposes, the value of all meals or lodging of appreciable value furnished by an employer ordinarily constitutes taxable wages. For purposes of this case, the pertinent portion of Treasury Regulations (Section 31.3121(a)-1(f) (26 C.F.R.) (emphasis supplied)) provides:[13]

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or fur-

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changed in Treas. Reg. 128, § 408.226 (1951). The current Regulations were promulgated in 1956. T.D. 6190, 1956-2 Cum. Bull. 605, 619 (FICA); T.D. 6199, 1956-2 Cum. Bull. 721, 740 (FUTA). *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464, 465 (9th Cir. 1943); *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967).

[12] Social Security Board Regulations on Federal Old-Age and Survivors Insurance under Title II of the Social Security Act, Section 403.827 (20 C.F.R. (1940)); Social Security Administration Regulations on Federal Old Age, Survivors and Disability Insurance, Section 404.1026 (20 C.F.R. (1969)); Social Security Administration Regulations on Federal Old-Age, Survivors and Disability Insurance (1950), Section 404.1043 (20 C.F.R.)).

[13] Section 31.3306(b)-1 of the Treasury Regulations on Employment Tax, Appendix, *infra*, 7a-8a, and Section 404.1043 of the Social Security Regulations on Old-Age, Survivors, and Disability Insurance, Appendix, *infra*, 4a-5a, which define wages respectively for FUTA and Social Security (OASDI) benefit purposes, are essentially identical.

> nished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. *The term "facilities or privileges," however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.*

These Regulations were issued pursuant to express congressional delegations of authority to the Secretary of the Treasury and the Social Security Board to establish the correlative rules necessary to administer the statutory tax and benefit program.[14] Moreover, they are entitled to special deference insofar as they have been repromulgated without substan-

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[14] The legislative delegations with respect to the tax provisions were contained in Sections 808, 908 and 1102 of the Social Security Act of 1935 (ch. 531, 49 Stat. 638, 643, 647). Section 1102 is now codified as 42 U.S.C. 1302. Sections 808 and 908 were reenacted respectively as Sections 1535 and 1609 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)). In the Internal Revenue Code of 1954, Sections 808 and 908 were not retained in separate sections. Instead, they were incorporated into Section 7805 of the Internal Revenue Code of 1954 (26 U.S.C.), without any change in meaning or scope. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954). See *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314, 1322 (E.D. N.C. 1977), subsequent opinion, 43 A.F.T.R.2d (P-H) ¶ 79-473, at 872 & n.12 (E.D. N.C. Sept. 27, 1978), aff'd per curiam, No. 80-1473 (4th Cir. Feb. 24, 1981).

The legislative delegations with respect to the benefit statutes were contained in Sections 205 and 1102 of the Act (ch. 531, 49 Stat. 624, 647). They are now codified as 42 U.S.C. 405(a) and 1302.

tial change for more than 40 years through reenactments of the underlying statutes.[15] In these circumstances, we submit that "the Regulations have acquired the force of law." *Cammarano* v. *United States*, 358 U.S. 498, 510 (1959). As the Court stated in *United States* v. *Correll*, 389 U.S. 299, 305 (1967), "Treasury Regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes are deemed to have received congressional approval and have the effect of law." See also *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938).

b. Indeed, the reenactment of the employment tax statutes in 1954 has even greater significance in light of the decision of the Ninth Circuit in *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (1943). There, the court held that the value of meals and lodging furnished to Alaska cannery workers was includable in wages for social security tax and benefit purposes. As the court explained, the statutory term "wages" necessarily includes the value of employer-furnished meals and lodging because Congress intended to provide each wage-earner with the broadest measure of old-age security, unemployment insurance, and security for minor dependents. In so ruling,

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[15] Section 1426 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), under which the FICA Regulation was originally promulgated, was reenacted as Section 3121(a) of the 1954 Code. Section 1607 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), under which the FUTA Regulation was originally issued, was reenacted as Section 3306(b) of the 1954 Code. Section 209 of the Social Security Act, *supra*, under which the Social Security OASDI Regulations were originally issued, was reenacted in the Social Security Act Amendments of 1946, ch. 951, Section 414(a), 60 Stat. 990 and in the Act of Aug. 28, 1950, ch. 809, Section 104(a), 64 Stat. 492.

the court distinguished the provisions for withholding of income taxes from "wages," which are levied to defray the expenses of government (*id.* at 465). The Ninth Circuit therefore concluded that the convenience-of-the-employer exclusion of the value of such meals and lodging from the income tax could not be imported into the social security tax system. There is no reason to doubt that Congress was aware of the *Pacific American Fisheries* decision at the time it reenacted the underlying statutes in 1954.

The Sixth Circuit upheld the validity of the Regulations on the basis of the *Pacific American Fisheries* rationale. In *S.S. Kresge Co.* v. *United States*, 218 F. Supp. 240, 243 (E.D. Mich. 1963), the court held that the value of one free meal a day, which cost the employer a maximum of 30 cents was includable in wages for social security tax purposes. In so ruling, the court expressly relied upon *Pacific American Fisheries*, stating that "social security taxes * * * help finance a program of social insurance whereby benefits may be paid to the retired and disabled and their dependents" while the income tax exclusion for meals furnished for the convenience of the employer was solely intended to be "a method by which tax relief from the payment of income taxes is provided to an employee. * * *" In an identical case involving a later year, the Sixth Circuit expressly approved the district court's opinion. *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967).[16]

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[16] Contrary to petitioner's argument (Br. 24-27), *Pacific American Fisheries* and *S.S. Kresge* cannot be distinguished on the ground that the courts there found a specific quid pro quo between the employees' rendering of services and the furnishing of free meals and lodging. As the court below stated (Pet. App. 6a), although the Ninth and Sixth Circuits

And in *Goldsboro Christian Schools, Inc.* v. *United States, supra,* the Fourth Circuit rendered the most recent decision upholding the Regulations at issue in this case. There, it ruled that the value of lodging furnished without charge to teachers constitutes taxable wages for FICA and FUTA tax purposes.[17]

Finally, as the decision below correctly pointed out (Pet. App. 4a-5a n.5), the body of published rulings by the Commissioner at the time of the 1954 reenact-

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relied upon the existence of a quid pro quo nexus as an alternative basis for their decisions, they rested their conclusions primarily on the legislative history and Regulations setting forth the broad scope of the statutory term "wages." Indeed, in holding in *Social Security Board* v. *Nierotko, supra,* 327 U.S. 358 (1946), that a back pay award was includable as taxable wages, this Court rejected much the same argument that wages must represent a quid pro quo for specific services.

[17] Decisions under virtually identical state unemployment statutes are to the same effect. In *California Employment Commission* v. *Black Foxe Military Institute,* 43 Cal. App. 2d 868, 872, 110 P. 2d 729, 732 (App. Dep't Super. Ct. 1941), the court stated that "It is important to the attainment of the * * * [purposes of the unemployment statutory scheme] that the real compensation be not minimized or concealed by embodying it in other forms than money payments." The court accordingly held that the value of room and board furnished to employees of a boarding school was includable in wages, regardless of the excludability of such convenience-of-the-employer benefits under the income tax. Accord, *Worthington Constr. Co.* v. *Employment Sec. Div., A.D.L.,* 413 P.2d 929 (Alaska 1966) (value of convenience-of-the-employer room and board furnished to construction workers includable in wages under the unemployment statutes).

Most of the federal FUTA tax liability of each employer is offset by a credit for the state unemployment tax on "wages;" the employer must pay this state tax under its respective state unemployment tax law, which must conform to requirements established by federal law. See *Carmichael* v. *Southern Coal Co.,* 301 U.S. 495 (1937).

ment of the social security tax statutes was fully in accord with the *Pacific American Fisheries* decision. In 1940, almost simultaneously with the promulgation of the FICA and FUTA Regulations, the Commissioner ruled that meals and lodging furnished to the officers and crew of a steamship company constituted taxable wages under FICA and FUTA. S.S.T. 386, 1940-1 Cum. Bull. 211.[18] Accord: Rev. Rul. 71-290, 1971-2 Cum. Bull. 340. In 1944 and again in 1954, the Commissioner of Internal Revenue explained in some detail that employer-furnished meals and lodging were included in FICA and FUTA wages, despite their exclusion under the convenience-of-the-employer rule from wages for income tax purposes. Mim. 5657, 1944 Cum. Bull. 550; Rev. Rul. 54-593, 1954-2 Cum. Bull. 30. Meals and lodging furnished without charge to officers and crew aboard fishing schooners, for the convenience of the employer, were held to be includable in FICA and FUTA wages in Rev. Rul. 72-385, 1972-2 Cum. Bull. 536, 538.[19]

Moreover, the published position of the Social Security OASDI agencies has been consistently in ac-

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[18] Section 403.227 of the 1940 FUTA Regulations omitted the phrase "or to seamen or other employees aboard vessels." The phrase was inserted in the FUTA Regulations when the current Regulations were promulgated in 1956. However, in S.S.T. 386, *supra*, the Service explained that the phrase was omitted in the FUTA Regulations because an earlier FUTA ruling, S.S.T. 321, 1938-2 Cum. Bull. 323, had already held that the value of room and board was includable in FUTA wages.

[19] Similarly, the Internal Revenue Service has ruled that the value of meals furnished to religious leaders for the convenience of their employer is includable in FICA and FUTA wages. Rev. Rul. 77-80, 1977-1 Cum. Bull. 36.

cord with that of the Commissioner of Internal Revenue. In 1947, the General Counsel of the Federal Security Agency ruled that wages for FICA and FUTA purposes should include the value of meals and lodging furnished for the convenience of the employer to workers on 24-hour call at an isolated power plant. *Federal Security Agency Digest of Rulings* (OASI), ¶ OB 1020.1 (GC-41) (1947). In S.S.R. 67-41a, 1967 Soc. Sec. Cum. Bull. 81, the Social Security Appeals Council held that free meals and lodging furnished to a housekeeper in a Catholic rectory must be included in her wages benefit base. And in S.S.R. 77-18, 1977 Soc. Sec. Cum. Bull. 84, the Social Security Commissioner held that free lodging furnished to state park rangers, who were required to live in parks, must be included in their wages for purposes of voluntary contribution assessments made against state participation in the system.

3. Contrary to petitioner's argument (Br. 10-11, 13-18), the fact that an early pre-1940 version of the unemployment tax (FUTA) Regulations briefly provided for exclusion of meals furnished for the convenience of the employer does not constitute a "recognition" by the government that meals and lodging are now excludable from the FICA and FUTA "wages" tax base.

The Regulation to which petitioner refers (Br. 10) —Treas. Reg. 90, Art. 207 (1936)—provided for FUTA purposes that "facilities or privileges (such as * * * cafeterias, restaurants * * *), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a convenience to the employer * * *." There was, however, no comparable conven-

ience-of-the-employer exclusion under the Regulations interpreting the OASDI tax provisions of Title VIII of the Social Security Act (Treas. Reg. 91, Art. 14 (1936)), or under the OASDI benefit Regulations (Section 402.13 of the Social Security Board Regulations on Federal Old-Age Benefits (20 C.F.R., 1st ed. 1938)) (2 Fed. Reg. 1276, 1280 (1937)).

The early FUTA Regulation incorporating the convenience-of-the-employer rule was the authority upon which some rulings were issued holding that the value of meals was excludable from wages. For example, in 1938, the Service ruled that free lunch privileges were not taxable under FICA and FUTA. S.S.T. 302, 1938-1 Cum. Bull. 456 (free cafeteria meals excludable from taxable wages). See also S.S.T. 110, 1937-1 Cum. Bull. 440 (supper money paid to employees working overtime for the convenience of the employer excludable from taxable wages).

But the 1936 FUTA Regulation adopting the convenience-of-employer rule and the attendant rulings which applied it were short-lived. After the enactment of the Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360, new FICA and FUTA Regulations were issued in 1940, which omitted the convenience-of-the-employer exclusion. The text of the 1940 Regulations was virtually identical to that of the present Regulations governing this case. See Treas. Reg. 106, § 402.227 (1940) (FICA); Treas. Reg. 107, § 403.227 (1940) (FUTA). (See 5 Fed. Reg. 3704, 3717 (1940).)[20]

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[20] In the same year, the Social Security Board amended its Regulation to conform to the Treasury Regulations. See Social Security Board Regulations on Federal Old-Age and Survivors Insurance under Title II of the Social Security Act,

In sum, the FICA and FUTA Regulations have stood without change for more than 40 years through a reenactment of the statute, during which time they have consistently rejected the applicability of the convenience-of-the-employer exclusion to the definition of "wages." The fact that for a brief four-year period (1936-1940) the FUTA Regulation applied a convenience-of-the-employer rule does not undermine

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Section 403.827 (20 C.F.R. (1940)). With the issuance of the 1940 Regulations, the rulings that were based upon the convenience-of-the-employer rule were, with one exception, revoked.

The single exception was S.S.T. 302, *supra*, which ruled that the value of cafeteria meals to bank employees was excludable from FICA and FUTA wages. In 1957, the Service ruled that the value of free meals furnished to employees in the restaurant industry was includable in wages for Social Security tax purposes. Rev. Rul. 57-471, 1957-2 Cum. Bull. 630. But the ruling noted that S.S.T. 302 had never been formally revoked, and went on to state that banks and trust companies—the narrow class of employers involved in S.S.T. 302—could continue to exclude the value of cafeteria lunches from their employees' wages. In 1962, the Service determined that S.S.T. 302 was in irreconcilable conflict with the 1940 and 1956 FICA and FUTA Regulations. It therefore formally revoked S.S.T. 302, reaffirming that all meals of appreciable value are includable in the Social Security wages base. Rev. Rul. 62-150, 1962-2 Cum. Bull. 213. That has been the Service's consistent position to the present day. Whatever confusion may have been engendered by the Service's failure to revoke S.S.T. 302 regarding the includability of the value of a workday cafeteria meal furnished without charge to bank and trust company employees, that ruling has no application to this case involving the value of three meals per day, plus lodging, furnished to oil rig workers. At all events, S.S.T. 302, *supra*, was formally revoked in 1962, five years before the first taxable year at issue here.

the validity of the present Regulation, requiring inclusion of meals and lodging, or its application to petitioner. As the Court recently observed in *National Muffler Dealers Ass'n* v. *United States*, *supra*, 440 U.S. at 485-486, with respect to a Treasury Regulation which had likewise been amended in the early stages, but which was thereafter consistently applied for more than 50 years—

> We would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience. In *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 101 (1939), the Court acknowledged the need for flexibility and applied a 1929 regulation to a taxpayer even though the taxpayer had acted in reliance on an opposite interpretation incorporated in an earlier regulation. Here, where there is no claim that the [taxpayer] ever relied on the Commissioner's prior view, the case for accepting the later regulation as authoritative is even stronger.

C. The Exclusion of the Value of Employer-Furnished Meals and Lodging From the Income Tax and Income Tax Withholding Provides No Basis For Exclusion of Such Compensation From FICA and FUTA Taxes

1. Faced with the formidable obstacles of plain statutory language, legislative history implemented by longstanding Regulations extant during reenactment of the statutes, and supporting published rulings, petitioner counters (Br. 6-9) with the fact that the value of the meals and lodging it furnished to its employees is excludable from their gross income for income tax purposes under the convenience-of-the-employer rule of Section 119 of the Internal Revenue Code of 1954 and not subject to income tax withholding. From this premise, petitioner concludes (Br. 11-

12) that the fact that the meals and lodging are not "wages" subject to income tax withholding necessarily means that they are not "wages" subject to FICA and FUTA. As petitioner sees the matter, the statutory term "wages" for purposes of income tax withholding (26 U.S.C. 3401) has the identical meaning under the FICA and FUTA provisions (26 U.S.C. 3121(a), 3306(b)). In support of this contention, petitioner places substantial reliance (Br. 19, 24) upon this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), as well as upon *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct. Cl. 1979), cert. denied, 444 U.S. 1032 (1980); and *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980).

We do not quarrel with petitioner's claim that the value of the meals and lodging are excludable from its employees' income for income tax purposes under Section 119 of the Code. That statute, as the Court is doubtless aware from its decision in *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977), provides that the value of any meals or lodging furnished by an employer to his employee for the convenience of the employer is excluded from the employee's gross income, if (1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of the employer as a condition of employment.

Here, the statutory conditions for exclusion under Section 119 are met because the meals and lodging are furnished on petitioner's premises and the employees are required to sleep in the quarters during their off-shore shift. As for income tax withholding, Treasury Regulations, Section 31.3401(a)-1(b)(9) (26 C.F.R.) specifically provides that "[t]he value of

any meals or lodging furnished to an employee by an employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119-1 of this chapter (Income Tax Regulations)." As the court of appeals correctly observed, the rationale underlying the exclusion of such employee benefits from income tax withholding "is not difficult to surmise. * * * If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments" (Pet. App. 7a).

But the exclusion of meals and lodging furnished for the convenience of the employer for income tax and income tax withholding purposes is not applicable to the social security and unemployment insurance taxes imposed by FICA and FUTA. As we have pointed out (*supra*, pages 15-17), Congress intended to include all forms of remuneration, such as "room" and "board," in the tax base under FICA and FUTA to insure that employees receive the maximum benefits available under the Act. Hence, the convenience-of-the-employer income tax exclusion under Section 119 cannot, without specific statutory or regulatory authority, exempt from FICA and FUTA those items that indisputably fit within Congress' broad definition of "wages" as "all remuneration from employment, including the cash value of all remuneration paid in any medium other than cash" (26 U.S.C. 3121(a), 3306(b)).[21] In short, FICA and FUTA are a dis-

[21] The fact that the meals and lodging in this case were furnished for the convenience of the employer is not inconsistent with their status as remuneration. Here, petitioner furnished the meals and lodging gratuitously, thus providing an element of gain to the employees, which amounted to more than one-sixth of their cash wages. Cf. *Harris* v. *Lambros*, 56 F.2d 488, 489 (D.C. Cir. 1932). Because the employees received a benefit in addition to their cash wages, they received

tinct system of taxation, with their own detailed body of statutes and Regulations, to which the income tax rules ordinarily do not apply.[22]

An unbroken line of published rulings, beginning with the promulgation of the FICA and FUTA Regulations in 1940, refutes petitioners' attempt to import the convenience of the employer income tax exclusion into the FICA and FUTA tax base on "wages." As we have pointed out (*supra*, 23), at the time the Treasury Regulations were issued in what was virtually their present form, the Internal Revenue Service ruled that wages for social security tax purposes included the value of meals and lodging furnished to the officers and crew on steamships. S.S.T. 386, *supra*. In contrast, the 1943 Regulations defining wages under the 1942 income tax withholding statute,[23] while closely tracking the language of the 1940 FICA and FUTA Regulations defining

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remuneration to that extent, despite the fact that, as petitioner points out (Br. 6-9), the remunerative aspects of the meals and lodging were collateral to the employer's convenience in furnishing them. Under the FICA and FUTA statutes, that fact is irrelevant. The taxes they impose are based upon "all remuneration," whether or not it is furnished primarily for the convenience of the employer.

[22] Petitioner argues (Br. 27-30) that the convenience-of-the-employer exclusion under the income tax is applicable for FICA and FUTA purposes because the social security tax is an "income tax." But the social security tax cannot be so characterized. It is, as this Court observed, a "special income tax" (*Helvering* v. *Davis*, *supra*, 301 U.S. at 634) that rests upon particularized social goals unlike the ordinary income levy.

[23] Section 19.465-2(a) of Treas. Reg. 103, as amended by T.D. 5249, 1943 Cum. Bull. 580, 597, interpreting Section 465 of the Revenue Act of 1942, 56 Stat. 887.

wages, omitted the requirement that the value of meals and lodging be included in "wages." Moreover, within a few months after enactment of the 1943 income tax withholding tax statute,[24] the Treasury issued Regulations[25] expressly excluding the value of convenience-of-the-employer meals and lodging from wages for purposes of income tax withholding.

Moreover, in 1944, the Commissioner ruled that the 1940 FICA and FUTA Regulations required inclusion of the value of meals and lodging furnished for the employer's convenience, while the 1943 income tax withholding Regulations required exclusion of the value of such meals and lodging. Mim. 5657, 1944 Cum. Bull. 550. This ruling followed closely on the heels of the Ninth Circuit's decision upholding the validity of the includability of employer-furnished meals for Social Security tax purposes.

Finally, the Treasury Regulations and subsequent rulings have consistently reaffirmed the distinction between income tax withholding and social security taxes with respect to the applicability of the convenience-of-the-employer rule. In 1954, the income tax exclusion for convenience-of-the-employer meals and lodging was incorporated into Section 119 of the Internal Revenue Code of 1954. As the court of appeals noted (Pet. App. 7a), the Internal Revenue Service ruled at the time of the 1954 codification that the value of convenience-of-the-employer meals and lodging was excludable only for purposes of income tax withholding and not for social security taxes. Rev. Rul. 54-593, 1954-2 Cum. Bull. 30, 31. Shortly

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[24] Section 2 of the Current Tax Payment Act of 1943, ch. 120, 57 Stat. 126.

[25] Treas. Reg. 115, Section 404.101(a), approved September 3, 1943.

thereafter, in 1956, the current FICA and FUTA Regulations were promulgated. They, of course, continue to require the inclusion of the value of the convenience-of-the-employer meals and lodging in the FICA and FUTA wage base. To this day, the Commissioner of Internal Revenue has continued to treat income tax withholding and FICA and FUTA taxes differently.[26] And the Social Security OASDI agencies have likewise consistently interpreted their virtually identical Regulations to require inclusion in the "wages" base of the value of free meals and lodging, whether or not furnished for the employer's convenience.[27]

These rulings interpreting the Regulations are entitled to great weight. As this Court observed in *National Muffler Dealers Ass'n* v. *United States*, *supra*, 440 U.S. at 484 n.19, "the plausibility and consistency of the Commissioner's interpretation are rele-

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[26] See Rev. Rul. 62-150, 1962-2 Cum. Bull. 213 (value of one or more meals a day, furnished without charge to employees, constitutes wages for FICA and FUTA purposes, but not subject to income tax withholding if the convenience-of-the-employer rules are satisfied). Accord: Rev. Rul. 71-411, 1971-2 Cum. Bull. 103. The same distinction has been applied to meals furnished without charge aboard fishing vessels (Rev. Rul. 72-385, 1972-2 Cum. Bull. 536, 538) and to lodging furnished without charge to religious leaders. Rev. Rul. 77-80, 1977-1 Cum. Bull. 36, 37.

The rulings cited by petitioner (Br. 35), relating to meals and lodging paid for by trainmen and truckers on overnight trips, have no bearing upon the validity of the FICA and FUTA Regulations at issue here. These rulings discuss only the deductibility of such expenditures by employees as business expenses under Section 162 (26 U.S.C.).

[27] *Federal Security Agency Digest of Rulings* (OASI), ¶ OB 1020.1 (GC-41) (1947); S.S.R. 77-18, 1977 Soc. Sec. Cum. Bull. 84; S.S.R. 67-41a, 1967 Soc. Sec. Cum. Bull. 81.

vant to the reasonableness of the regulation as applied here, [but] the Commissioner is otherwise free to determine how the regulation he has written should be construed."

2.a. Given the explicit requirement of the long-standing body of Treasury Regulations and rulings that the value of employer-furnished meals and lodging be included in "wages" for social security tax purposes but not for income tax withholding purposes, it is plain that *Central Illinois Public Service Co.* v. *United States*, *supra*, 435 U.S. 21, does not bear upon the FICA and FUTA tax question presented in this case. There, the Court held that an employer's reimbursement for 1963 lunch expenses incurred by employees on nonovernight company travel did not constitute "wages" subject to *income tax* withholding by their employer within the meaning of Section 3401 of the Code.

But that decision turned on the fact that the pertinent Treasury Regulation excluded from wages subject to income tax withholding amounts paid for travel or other business expenses without regard to whether the travel was away from home overnight. See Treasury Regulations, Section 31.3401(a)-1(b)(2) (26 C.F.R.) (435 U.S. at 27). In these circumstances, the Court was reluctant to impose secondary tax liability on the employer by retroactively applying the overnight rule of *United States* v. *Correll*, 389 U.S. 299 (1967), to the year 1963 when "not one regulation or ruling required withholding on any travel expense reimbursement" (435 U.S. at 32). See also *id.* at 33-38, Brennan, J., concurring; *id.* at 39, Powell, J., concurring. Here, by contrast, the Treasury Regulations and the published rulings extant during the year at issue (and for more than 40 years) unambiguously require the inclusion of meals and

lodging in the FICA and FUTA "wages" tax base.[28] Petitioner and all similarly-situated employers were therefore fully on notice of the Service's position.[29] As the court below succinctly put it in similarly distinguishing *Central Illinois Public Service Co.*, "[t]he factors considered [in that case] * * * do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations, is invalid" (Pet. App. 10a; footnote omitted).[30]

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[28] The fact that the government sought to defer proceedings in FICA and FUTA cases until this Court rendered its decision in *Central Illinois Public Service Co.* does not, as petitioner suggests (Br. 19-20), betray a concession that the case is authoritative here. Such actions were merely a precaution taken prior to the issuance of Court's opinion setting forth the grounds of the decision.

[29] Contrary to petitioner's argument (Br. 33-35)—which it did not raise in the court of appeals—the daily provision of meals and lodging at issue here is not travel reimbursement within the meaning of the FICA and FUTA counterparts of the Regulation involved in *Central Illinois Public Service Co.* Indeed, the existence of a specific Regulation requiring the inclusion of "meals and lodging furnished * * * to seamen or other employees aboard vessels," together with Regulations excluding travel reimbursements, refutes petitioner's attempted analogy. Accord: S.S.T. 386, *supra*. Moreover, petitioner's argument falls in light of Congress' plainly stated intention to include in the social security base the value of "room" and "board" furnished in kind to employees (see page 17, *supra*).

[30] *Royster Co.* v. *United States*, 479 F.2d 387 (4th Cir. 1973), upon which petitioner relies (Br. 38-40), likewise does not support its claimed exclusion from FICA and FUTA of the meals and lodging at issue here. Rather, the principal question presented in that case was the same as in *Central Illinois Public Service Co.* In *Royster Co.*, the court held that

b. If, as we submit, *Central Illinois Public Service Co.* has no bearing upon the FICA and FUTA question presented here, no basis remains for the decisions in *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct.Cl. 1979), cert. denied, 444 U.S. 1032 (1980), and *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980). Those decisions, upon which petitioner relies (Br. 38-41), cite *Central Illinois Public Service Co.* for the proposition that the term "wages" has the identical meaning under FICA, FUTA, and income tax withholding so that employee benefits that do not constitute "wages" for income tax withholding purposes are likewise excludable from FICA and FUTA.

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payments for noon meals consumed by salesmen engaged in nonovernight travel were not "wages" under Section 3401(a) for purposes of *income* tax withholding. Since the FICA and FUTA Regulations with respect to such travel reimbursements were identical to the income tax withholding Regulations, the court further held them to be excludable from the FICA and FUTA "wages" base. See Treasury Regulations, Sections 31.3121(a)-1(h) (FICA), 31.3306(b)-1(h) (FUTA); 31.3401(a)-1(b)(2) (income tax withholding), Appendix, *infra*, 7a-9a. See also Social Security OASDI Regulations, Section 404.1045 (20 C.F.R.). Appendix, *infra*, 5a.

Here, however, the meals and lodging involved are of a nontravel character. They are therefore governed by different Regulations. Indeed, in *Goldsboro Christian Schools, Inc.* v. *United States, supra*, the Fourth Circuit recently held that the value of lodging furnished to teachers is includable in FICA and FUTA wages in accordance with the Regulations at issue here and that the convenience-of-the-employer income tax exclusion had no application. In so holding, the court distinguished its prior *Royster Co.* decision on the ground that it involved travel reimbursements covered by different Regulations.

In *Hotel Conquistador*, the Court of Claims held that the value of meals furnished to hotel and restaurant employees for the employer's convenience was not includable as "wages" for FICA and FUTA tax purposes. In so holding, the court observed that the prior appellate decisions upholding the Regulations "did not have * * * the benefit of the criteria to apply to regulations in this area, as prescribed in *Central Illinois* * * *" (597 F.2d at 1354).[31] In *Oscar Mayer & Co.*, the Seventh Circuit held that an employer's furnishing company-owned cars for the personal use of employees at less than cost did not constitute "wages" for FICA and FUTA tax purposes. The court likewise relied upon *Central Illinois Public Service Co.* and the discussion of that case by the Court of Claims in *Hotel Conquistador* (see 623 F.2d at 1226-1227). In the Seventh Circuit's view, it was unnecessary to address the question whether the FICA and FUTA Regulations applied because the below-cost automobiles did not constitute "wages" for withholding tax purposes and their value was therefore excludable from "wages" under FICA and FUTA (*id.* at 1228).[32]

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[31] Contrary to petitioner's suggestion (Br. 17 n.16), the government's decision to concede in *Harris Trust & Savings Bank* v. *United States*, No. 105-79T (Ct. Cl. Jan. 16, 1981), does not signal a reversal of its position. That case involved the FICA and FUTA tax consequences of an employer's providing below-cost cafeteria meals to its employees. However, the government's concession was based upon the practical consideration that it would have been fruitless to pursue such a case in the Court of Claims after its adverse decision in *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (1979), and this Court's denial of certiorari in that case (444 U.S. 1032 (1980)).

[32] In *Oscar Mayer & Co.*, the Seventh Circuit also observed (623 F.2d at 1227-1228) that the FICA and FUTA Regula-

But as we have pointed out (*supra*, pages 33-34), *Central Illinois Public Service Co.*, does not stand for the proposition that the term "wages" for income tax withholding has the equivalent meaning under FICA and FUTA. The decision in that case rests on the narrow ground that the withholding tax Regulations extant during the year at issue supported the lunch reimbursements as travel expenses. The fact that identical Regulations supported excludability under FICA and FUTA (see *Royster Co.* v. *United States*, *supra*) does not establish any general congruence among the three employment tax statutes with respect to the definition of "wages." Indeed,

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tions failed to provide a method of computing the "fair value" of benefits. But such computations have been made without difficulty for many years under the Regulations. Indeed, most of the states have established standard values which may be used for meals and lodging, and the Internal Revenue Service commonly gives weight to these figures in making its valuation (Rev. Rul. 76-148, 1976-1 Cum. Bull. 310). See 1B Unempl. Ins. Rep. (CCH) ¶ 1215 (1981), for a table of the values assigned by the various states.

The *amicus* YMCA of Metropolitan Hartford, Inc., predicts (Memo. 14-15) that if the government succeeds in including the value of meals and lodging in the instant case, it will seek to include a broad range of other fringe benefits in "wages," thus requiring "[e]mployers to speculate at their own risk * * * as to items subject to employment tax * * *." But no such augury is warranted. The Treasury has advised us that its settled practice is to include the value of fringe benefits in "wages" only when the law clearly requires it. The meals and lodging involved here and in *Hotel Conquistador* are specifically listed as includable wages in the legislative history of the Social Security Act. The use of company cars for personal use, which was involved in *Oscar Mayer & Co.*, has long been recognized as taxable income. *Rodgers Dairy Co.* v. *Commissioner*, 14 T.C. 66 (1950); *Estate of Runnels* v. *Commissioner*, 54 T.C. 762, 767 (1970).

such a generalization is graphically refuted by the 14-page table in 1 Unempl. Ins. Rep. (CCH) ¶ 10,000 at 171-184 (1980), which lists literally dozens of differences between the scope of "wages" for purposes of income tax withholding, and "wages" under FICA and FUTA.

In short, the definition of "wages" cannot, as petitioners would have it, be forced into a uniform mold that is applicable for income tax withholding, FICA and FUTA. Contrary to the Court of Claims and the Seventh Circuit, the fact that an item may be excluded from income tax withholding does not dictate a similar exclusion under FICA and FUTA. In fact, *Central Illinois Public Service Co.* teaches that such facile generalizations (see 435 U.S. at 29) cannot stand against the body of detailed Regulations and interpretative rulings governing the employment tax area.[33] As the court below properly concluded (Pet. App. 9a),

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[33] While the Court of Claims in *Hotel Conquistador* did not explicitly strike down the Regulations which we urge to be controlling in these cases, it concluded that the Regulations' use of the terms "generally" and "ordinarily" to characterize the circumstances under which the value of meals to such employee would constitute "wages" made them too vague to serve as a guide to employers.

But the Treasury's casting of the meals-as-wages rule as a "general" or "ordinary" proposition is simply designed to exclude the particular situation where meals are provided on a nonrecurring infrequent basis so that they do not represent a significant aspect of the employee's compensation. That is assuredly not this case. In *Hotel Conquistador*, the taxpayer provided daily meals of a prescribed character in accordance with its obligations under a labor contract and those meals constituted 8.3% of the employees' gross wages (597 F.2d at 1350). Here, as we have pointed out (page 4, note 5), the meals and lodging furnished by petitioner constituted 17% of its employees' gross income. Under these circum-

> The inquiry is not, however, merely one of semantic comparison. The words, even if identical, are not components of an algebraic equation each side of which must inevitably yield the same result. We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike but in deciding to what extent Congress purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. * * * Resolution of the issue does not turn on how we would, without further guidance, interpret the words, but on whether the construction reached by the Secretary is a permissible one.

3. Finally, nothing in the legislative history of either the witholding tax or of Section 119, cited by petitioner (Br. 10-13), supports its attempt to import the income tax convenience-of-the-employer exclusion into the FICA and FUTA definition of "wages."

To be sure, in enacting the income tax witholding provisions in 1942, Congress intended that certain "exceptions" to the Social Security tax would likewise be applicable to the withholding tax. But petitioner's quotation (Br. 10-11) of the pertinent committee report (S. Rep. No. 1631 (Pt. 1), 77th Cong., 2d Sess. 166 (1942)) omits five crucial sentences. The deleted portion demonstrates beyond question that the "identical" "exceptions" to which Congress referred

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stances, we submit, the meals plainly constitute "remuneration" within the meaning of the statute. There is no basis in either the statute or Regulations for the Court of Claims' restrictive gloss that meals are includable in "wages" only if they are of "such massive quantities of free food * * * as to compel the inference that the cash wage could not but be set lower in light of these emoluments * * *" (597 F.2d at 1352).

involved specified services performed by military personnel, agricultural labor, domestic workers, etc.,[34] and not, as petitioner urges, meals and lodging furnished for the convenience of the employer.

The full excerpt from the Committee Report (with the portions omitted by petitioner italicized) reads as follows:

> With certain specified exceptions, the term is defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer. *Under the exceptions provided, remuneration for the following services will not be subject to collection at the source: Services performed as a member of the military or naval forces of the United States. This exception does not extend to remuneration in the form of pensions and retired pay, if such remuneration is includible in gross income under the provisions*

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[34] These services were originally excluded from Social Security coverage (Social Security Act of 1935, Section 209(b), as amended by the Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1373; Sections 1426(b) and 1607(c) of the Internal Revenue Code of 1939) for various reasons of policy and practical convenience. *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 584; *Carmichael* v. *Southern Coal Co., supra,* 301 U.S. at 513. When Congress enacted the first modern income tax withholding statute in the Revenue Act of 1942, ch. 619, 56 Stat. 798, it decided to exempt from withholding those workers and their employers who in most cases had never been subject to any withholding under the Social Security Act. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 126 (1942); S. Rep. No. 1631 (Pt. 1), *supra,* at 166. Some of these excepted services, such as those performed by some domestic workers and agricultural laborers, were later included in social security coverage. See, *e.g.*, Section 203(a), Social Security Act Amendments of 1950, ch. 809, 64 Stat. 525.

> *of section 22 of the Code. In connection with this exception, it should be noted that the definition of the term "military or naval forces of the United States," contained in section 3797(a)(15) of the Internal Revenue Code has been amended to specifically include the Women's Army Auxiliary Corps and the Women's Reserve Branch of the Naval Reserve. Exceptions are also provided with respect to remuneration paid for agricultural labor; domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; and casual labor not in the course of the employer's trade or business.* These exceptions are identical with the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope. *These exceptions will relieve farmers, housewives, and others from the burden of collecting and accounting for small amounts of tax and will reduce the administrative burden and cost of collection entailed in the handling of numerous returns involving only nominal amounts. Exceptions are also provided with respect to remuneration for services as an employee of a nonresident alien individual, foreign partnership, or foreign corporation if such employers are not engaged in trade or business in the United States, and remuneration for services as an employee of a foreign government or a wholly owned instrumentality thereof.*

Thus, the common set of "exceptions" for certain services has no connection with the convenience-of-the-employer exclusion for meals and lodging. It surely strains credulity to suggest that Congress would have altered the FICA and FUTA definition of "wages" by means of what is at best an oblique ref-

erence in a committee report dealing with income tax withholding.[35] There is accordingly nothing in the legislative history of any other tax provision that casts doubt upon the validity of the controlling Regu-

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[35] The excerpt from H.R. Rep. No. 510, 78th Cong., 1st Sess. 28 (1943), cited by petitioner (Br. 37), is likewise irrelevant. It simply evidences Congress' intent to coordinate the mechanical task of withholding income taxes and social security taxes. It does not address the definition of "wages" under FICA and FUTA.

The quotation by the *amicus* YMCA of Metropolitan Hartford, Inc. (Memo. 7) from this 1943 Committee Report on the 1943 income tax withholding statute—that "the general definition of the term wages in [the 1943 withholding statute] is the same as that contained in existing law"—has no bearing on this case. It merely reflects the fact that the 1943 income tax withholding provision was virtually the same as the 1942 income tax withholding provision. Cf. Revenue Act of 1942, ch. 619, Section 172, 56 Stat. 884.

Nor does the 1978 colloquy between Senators Dole and Long, upon which petitioners rely (Br. 12-13 n.10), cast doubt upon the validity of the FICA and FUTA Regulations upheld by the decision below. As petitioners acknowledge (*ibid.*), the legislative proposal then under discussion dealt with a technical amendment to the income tax exclusion for meals provided by Section 119. The legislation had no effect upon FICA and FUTA coverage. Indeed, during the same discussion, Senator Long stated that "The bill would not change present law in any other respect." 124 Cong. Rec. S12366 (daily ed. Aug. 2, 1978). At all events, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). Accord: *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963); *Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 269 (1965); *United States* v. *Webb, Inc.*, 397 U.S. 179, 194 n.21 (1970); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1958); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *Mine Workers*, 330 U.S. 258, 380-382 (1947).

lations in this case. The FICA and FUTA Regulations requiring the inclusion of employer-furnished meals and lodging should therefore be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

(a) *Meals and Lodging Furnished to Employee, His Spouse, and His Dependents, Pursuant to Employment.*—There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

(b) *Special Rules.*—For purposes of subsection (a)—

(1) *Provisions of employment contract or state statute not to be determinative.*—In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

(2) *Certain factors not taken into account with respect to meals.*—In determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals shall not be taken into account.

* * * * *

SEC. 3101. RATE OF TAX.

(a) [as amended by Section 204(a)(1), of the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 836]. *Old-Age Survivors, and Disability Insurance.*—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121 (a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(3) with respect to wages received during the calendar years 1971 and 1972, the rate shall be 4.6 percent; * * *

* * * * *

SEC. 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance.*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a) and (t)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

SEC. 3121. DEFINITIONS.

(a) [as amended by Section 108(b)(2) of the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 835]. *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $7,800 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year.

* * *

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SEC. 3306. DEFINITIONS.

* * * * *

(b) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) [as amended by Section 302 of the Employment Security Amendments Act of 1970, Pub. L. No. 91-373, 84 Stat. 713] that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $4,200 with respect to employment has been paid to an indi-

vidual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. * * *

* * * * *

SEC. 3401. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

* * * * *

Social Security Act (42 U.S.C. 409):

SEC. 209. DEFINITION OF WAGES.

For the purposes of this subchapter, the term "wages" means remuneration paid prior to 1951 which was wages for the purposes of this subchapter under the law applicable to the payment of such remuneration, and remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

Social Security Administration Regulations on Federal Old-Age, Survivors and Disability Insurance (20 C.F.R.):

Sec. 404.1043 *Facilities or privileges—meals and lodging.*

(a) Generally, facilities or privileges that an employer furnishes or offers to an employee are not considered wages if the facilities or privileges—

(1) Are of relatively small value; and

(2) Are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of the employees.

(b) The term "facilities or privileges" includes such things as entertainment, medical services, and so-called "courtesy" discounts on purchases. The term does not usually include the value of meals or lodging furnished to employees. The value of these items is wages where—

(1) It is understood by the employer and employee that the employer is to furnish to the employee meals or lodging or both on a regular basis; or

(2) The value of the items is a large part of the total pay. For example, the value of meals or lodging furnished to hospital, restaurant, or hotel employees, or to seamen or other employees aboard vessels, is generally wages because either one or both of these conditions are met.

Sec. 404.1045 *Employee expenses.*

Amounts that your employer pays you specifically—either as advances or reimbursements—for traveling or for other ordinary and necessary expenses incurred, or reasonably expected to be incurred, in your employer's business are not wages. The employer must identify these travel and other expenses either by making a separate payment or by specifically stating the separate amounts if both wages and expense allowances are combined in a single payment.

Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.):

Sec. 31.3102-1 *Collection of, and liability for, employee tax; in general.*

(a) The employer shall collect from each of his employees the employee tax with respect to wages for employment performed for the employer by the employee. The employer shall make the collection by deducting or causing to be deducted the amount of the employee tax from such wages as and when paid. (For provisions relating to the time of such payment, see § 31.3121 (a)-2.) The employer is required to collect the tax, notwithstanding the wages are paid in something other than money, and to pay over the tax in money. (As to the exclusion from wages of remuneration paid in any medium other than cash for certain types of services, see § 31.3121(a)(7)-1, relating to such remuneration paid for service not in the course of the employer's trade or business or for domestic service in a private home of the employer; and § 31.3121(a)(8)-1, relating to such remuneration paid for agricultural labor.) For provisions relating to the collection of, and liability for, employee tax in respect of tips, see § 31.3102-3.

* * * * *

Sec. 31.3121(a)-1 *Wages.*

* * * * *

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for

employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * * * *

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * * * *

Sec. 31.3306(b)-1 *Wages.*

* * * * *

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of

promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * * * *

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * * * *

Sec. 31.3401(a)-1 *Wages.*

(a) *In general.* * * *

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

* * * * *

(b) *Certain specific items—* * * *

(2) *Traveling and other expenses.* Amounts paid specifically—either as advances or reim-

bursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

* * * * *

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ALEXANDER L. STEV
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government seeks authority to expand the commonly-understood narrow definition of "wages" as used in the context of social security (FICA) and unemployment (FUTA) taxes because of "the broad social welfare goals of the Social Security program" (Gov't Br. 7-8). It brings to this Court once again as it did in *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21 (1978), the argument that "wages" may be expansively and sweepingly defined to include "a broad range of personal benefit items," so long as they are "provided without charge by an employer to its employees, where such benefits arise out of the employer-employee relationship" (Gov't Br. 16-17). It additionally urges (Gov't Br. 15) that the need to maintain the "solvency of the social security trust fund" justifies the FICA and FUTA taxability of noncompensatory items such as employer-furnished meals and lodging, and further suggests that a failure to treat such noncompensatory items as "wages", even though such items are admittedly not "wages" for purposes of income tax withholding, would impair the Social Security Act's "attack on recognized evils in our national economy" (Gov't Br. 16). It attempts to distinguish the exclusion of meals and lodging furnished for the convenience of the employer from "wages" for income tax withholding on the ground that the exclusion for income tax withholding is based on the fact that such meals and lodging are not subject to income tax; it thus ignores the fact that in *Central Illinois,* the Court held reimbursements for meals not to be "wages" subject to income tax withholding even though admittedly subject to income tax. The Government also claims that because of the "particularized social goals"[1] of the social security system, the *employee* portion of the FICA tax, which is statutorily defined to be a tax on "income"[2]

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[1] Gov't Br. 30, fn. 22.

[2] See Pet. Br. 27-30.

can nonetheless be imposed by an interpretative regulation on an item that is not income to the employee. For the reasons set forth in Petitioner's opening brief and herein, these assertions disregard the intent of Congress in choosing "wages" as the identical basis for FICA, FUTA and income tax withholding and in narrowly defining such term to include only "remuneration" for services or employment. The decision of the court below improperly permits noncompensatory meals and lodging furnished by Petitioner to its employees to be taxed as FICA and FUTA "wages" even though they were unquestionably not "wages" for income tax withholding.

A. The "Facilities or Privileges" Regulations Cannot Convert Noncompensatory Meals and Lodging Into "Wages"

The "facilities or privileges" regulations [3] which, according to the Government, produce FICA and FUTA taxability of the meals and lodging in question, provide that "facilities or privileges" furnished employees will not be considered "remuneration" if they are of "relatively small value;" however, meals or lodging are not "ordinarily", "facilities or privileges", since "generally" they constitute an "appreciable" part of the total remuneration of such employees. The regulations leave open several key points: do they purport to reach *all* meals and lodging, assuming appreciability, or only meals and lodging that happen to be *both* remuneration and "appreciable"? Can meals and lodging be "appreciable", yet not remuneration, but be subject to FICA and FUTA taxes, or does appreciability itself equal taxability, regardless of whether such meals and lodging are in fact remuneration?

In order to sustain the Government's position herein, the regulations have to compel taxability once the "ap-

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[3] Reg. §§ 31.3121(a)-1(f) and 31.3306(b)-1(f), Pet. Br. App. 3a, 4a.

preciable" threshhold has been reached[4]—without regard to whether the particular meals and lodging are remuneration for services rendered, because if the "facilities or privileges" regulations do allow for an analysis of the remunerative qualities of the particular meals and lodging, the Government's objection to the application of the "convenience of the employer" in FICA and FUTA tax situations is without foundation. Would a trip to Europe on an employer's business be "wages" because its value is appreciable in relation to cash compensation while a trip to the county seat for an identical purpose would not? Obviously the regulations cannot mandate FICA and FUTA taxability *solely* by reason of the appreciability of the item involved, because rather than being merely an "interpretation of the statute"[5] as claimed by the Government, this would result in a clear change by regulation alone of the statute without Congressional action or approval.[6]

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[4] It is interesting to note that in determining the relative value of meals and lodging to cash compensation paid Rowan's offshore employees, the Government refers only to the lowest paid of Rowan's employees ($577 per month) and ignores employees receiving cash compensation up to $1,181 per month (J.A. 28a), while acknowledging that the meals and lodging furnished both were identical (Gov't Br. 3, fn. 3; 4, fn. 5; 38, fn. 33).

[5] See Gov't Br. 11.

[6] Petitioner does not agree with the Government's contention (Gov't Br. 11) that "there is no room for debate on whether the [1940] Regulations . . . are applicable" so as to make the meals and lodging here taxable under FICA and FUTA, in light of its own conclusion in Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, "explaining [1940] Treas. Reg. 106 . . . and . . . 107" (Gov't Br. 17, fn. 11), that with some exceptions not applicable here, S.S.T. 302, 1938-1 Cum. Bull. 456, holding meals furnished for the convenience of the employer *not* subject to FICA and FUTA, was still in effect 17 years after issuance of such regulations. Furthermore, as stated by the Court of Claims, even in the absense of a specific "convenience of employer" test in the regulations, there still re-

As set forth in our opening brief,[7] the convenience of employer test has been part of our Federal taxing system since 1919, 16 years before the enactment of the social security and unemployment taxes. During all these years, meals and lodging furnished for the convenience of the employer were repeatedly held in the cases and rulings not to be taxable as "income" in the face of statutory language defining "income" as specifically including "wages."[8] Had Congress chosen in 1935 to use as a tax base for social security and employment tax purposes all "personal benefit items" furnished an employee by an employer, as claimed in the Government's brief,[9] the Government's present argument that Congress intended to abandon traditional income tax concepts such as the convenience test in determining the proper FICA and FUTA tax base would have some force. Instead, Congress specified the tax base for these purposes to be "wages", a term that has been described by this Court as having a "well understood" meaning[10] which is "intentionally narrow and precise";[11] furthermore, the employee portion of the FICA tax[12] is imposed [only] on the *"income"* received by the employee, limited to his "wages", with

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mains the question of whether *"remuneration" is involved,* and that, in turn requires the court to consider "whether the employer furnishes free meals *primarily to effectuate his own policies,* or to sweeten the pot for employees." (Emphasis added). *Hotel Conquistador, Inc.* v. *United States,* 597 F. 2d 1348, 1353 (Ct.Cl., 1979).

[7] Pet. Br. 6-8.

[8] The rule was codified in 1954, but there has been no time since 1919—so far as Petitioner has been able to determine—in which the Government has claimed that meals or lodging furnished for the convenience of the employer constitute income. Pet. Br. 6-8, 12-13.

[9] See Gov't Br. 16-17.

[10] *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946).

[11] *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21, 31 (1978).

[12] I.R.C. Section 3101(a), Pet. Br. App. 1a. See Pet. Br. 27-30, and *infra,* pp. 17-18.

Congress specifying at the same time that the base for the employer portion of the tax was to be identical.[13]

In this light and when coupled with the income tax withholding system enacted seven years later with Congress again adopting "wages" as the operative tax base, a heavy burden should be on the Government to justify why its regulations pertaining to meals and lodging are not *identical* for all the employment taxes, FICA, FUTA and income tax withholding. The Government's argument that social policy considerations justify the differing, and in fact, conflicting, regulatory treatment of meals and lodging as "wages" among the various employment taxes is an improper arrogation of statutory authority, in clear contrast to the Government's acknowledged[14] duty to promulgate regulations designed to implement the Internal Revenue Code "in some reasonable manner." See *United States* v. *Correll,* 389 U.S. 299, 307 (1967). It should be clear that however inartfully phrased,[15] the "facilities or privileges" regulations cannot create taxable "wages" where there is no income.

B. The "Facilities or Privileges" Regulations Cannot Override the Intent of Congress That "Wages" Have the Same General Meaning for FICA, FUTA and Withholding On Income Taxes

In its discussion of the Congressional intent underlying the enactment of the FICA and FUTA taxes,[16]

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[13] The Ways and Means Committee Report stated (H. Rep. No. 615, 74th Cong., 1st Sess. 30 (1935):

> "Like the tax on employees under section 801, this tax [excise tax on employers] does not apply to all wages or employments but only to those defined as such in section 811."

See also S. Rep. No. 628, 74th Cong., 1st Sess. 42 (1935).

[14] See Gov't Br. 10-11.

[15] The Court of Claims has characterized these regulations as being "nearly worthless" as a guide to employers in their relations with employees. *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348, 1354 (Ct. Cl., 1979).

[16] Gov't Br. 13-27.

the Government repeatedly mischaracterizes the *income* tax imposed on employees by labelling it, inaccurately, as an "excise"[17] tax. Its companion tax, the employer portion of FICA, is in fact an excise tax as is FUTA, and all three taxes, plus the withholding on income tax, are lossely referred to as "employment" taxes. All four taxes have a common base, "wages". The rates and coverage of the four taxes vary,[18] all by reason of specific *Congressionally* enacted statute—not by Government regulation, but all of the four "employment" taxes define their common "wage" base to be "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash" (FICA and FUTA),[19] or "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash" (withholding on income).[20] The Fourth[21] and Seventh[22] Circuits and the Government on brief to the Fourth Circuit[23] have stated these definitions of "wages" to have the same essential meaning, and the Seventh Circuit has specifically held that this Court's narrow construction of the term "wages" in *Central Illinois* in the context of income tax withholding is equally applicable for FICA and FUTA tax purposes.[24]

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[17] Gov't Br. 7, 15.

[18] See Gov't Br. 37-38.

[19] I.R.C. Sections 3121(a), 3306(b). Pet. Br. App. 2a.

[20] I.R.C. Section 3401(a). Pet. Br. App. 2a-3a.

[21] *Royster Co.* v. *United States*, 479 F.2d 387, 390 (C.A. 4th, 1973).

[22] *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223, 1227 (C.A. 7th, 1980).

[23] Gov't Brief, p. 6, in *Royster, supra*, discussed at pp. 18-19 of Pet. opening brief herein.

[24] *Oscar Mayer & Co.* v. *United States*, 623 F.2d at 1227.

The Government's suggestion[25] that Congress intended the term "wages" to convert noncompensatory "personal benefit items" received by employees into taxable compensation for FICA and FUTA tax purposes has neither basis nor logic for support. Although it says that Congress defined the "wages" base in "broad and expansive terms," and that the current FICA/FUTA regulations are "consistent with the legislative history,"[26] it nowhere establishes such assertion to be true. It quotes for example (Gov't. Br. 17, 29 and 37, fn. 32) the 1935 Committee reports that:

> "Wages include not only the cash payments made to the employee for work done, but also *compensation for services in any other form,* such as room, board, etc. (Emphasis added.)

The Government then jumps to the conclusion that *all* "room and board" is subject to tax; the language quoted makes clear, however, that they are taxable only if they are "compensation"; as pointed out by the court in *Conquistador,* even "the regulation admits that not all food and lodging benefits are 'remuneration.' " 597 F.2d at 1353.

This Court has emphasized that "wages" is a "well understood word"[27] which Congress chose as a taxing standard because it is "intentionally narrow and precise".[28] This is the identical standard on which Congress chose to base the withholding on income tax system, and just as noncompensatory meals and lodging are excluded from wages for income tax withholding, so Congress intended they be excluded for FICA and FUTA tax purposes. For the Government to argue that noncompensatory meals and lodging should be treated

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[25] Gov't Br. 16-17.

[26] Gov't Br. 7, 8, 29.

[27] *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946).

[28] *Central Illinois Public Service Co.* v. *United States,* 435 U.S. at 31-32.

as wages for FICA and FUTA tax purposes but not wages for withholding tax purposes contradicts not only the intent of Congress in using the identical word "wages" (and essential identical definitions of such word) for the applicable tax bases, but also its clearly stated intent that the "collection, payment, and administration of withholding" were to be "coordinated generally" with the employee FICA tax.[29] This is particularly true in light of the fact that when the FICA and FUTA taxes were first enacted in 1935, it had been repeatedly held for 16 years that meals and lodging for the convenience of the employer were not included in the base of the income tax, even though the income tax statutes similarly specified "wages" to be included in the tax base. See Pet. Br. 6-8. The Government's argument also contradicts the present understanding of Congress as to the identical treatment of meals and lodging for all employment tax purposes.[30]

The Government's repeated references to the social needs served by the FICA and FUTA taxes[31] simply have no bearing on the issue before this Court. This case does not involve in any way a question as to the validity or necessity for such taxes, but instead addresses again, as in *Central Illinois*, the limited question of what Congress intended the term "wages" to mean. The Government's claim that the social purposes underlying the FICA and FUTA taxes warrant the distortion by regulation of the plain meaning of such term to increase FICA and FUTA revenues is patently without foundation. It is also directly contrary to the very intent of Congress in selecting "wages" to be the identical tax base for FICA, FUTA and withholding

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[29] H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943), at 28. See Pet. Br. 9-11, 36-38.

[30] See Pet. Br. 12-13, fn. 10; p. 11, fn. 38, *infra*.

[31] See Gov't Br. 7, 8, 15, 16-17, and 29.

on income taxes. To suggest, as the Government does,[32] that the social security and unemployment taxes fund more laudable activities than those funded by other tax revenues, and accordingly justify a different interpretation of a term deliberately chosen by Congress as common to both types of taxes, approaches the absurd.

It is clear both from a reading of the FICA and FUTA statutes and from this Court's decision in *Nierotko*[33] that Congress did not delegate to the Government the ability to determine what is or is not subject to FICA and FUTA taxes; Congress provided that only "wages", or remuneration for employment, is taxable. Nonetheless, the Government continues to assert, erroneously, that it has been granted authority to issue "legislative" regulations defining what is or is not "wages,"[34] notwithstanding an unquestionable absence of such grant. Without dwelling on this error it is interesting to note the Government's ready acknowledgement in another setting where it would serve the Government's interest to assert otherwise, that regulations issued under Section 7805[35] of the Code are in fact "interpretative", and not "legislative" as claimed by the Government herein. See Brief for the United States as *amicus curiae,* pp. 19-20, fn. 12, *Alessi, et al.* v. *Raybestos-Manhattan, Inc., Buczynski, et al.* v. *General*

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[32] See Gov't Br. at 7-8, 15.

[33] 327 U.S. at 368, 369.

[34] See Gov't Br. 12-13, 19-20.

[35] When the social security and unemployment tax provisions were incorporated into the Internal Revenue of 1954, the authority to issue regulations with respect to such taxes was transferred to Section 7805 "without any change in meaning or scope." See Gov't Br. 19, fn. 14. Unlike situations elsewhere in the Internal Revenue Code where the Treasury has been granted specific authority to issue legislative regulations, regulations issued under the general authority of Section 7805 are merely interpretative. See Pet. Br. 30-31.

Motors, Sup. Ct. Nos. 79-1943, 80-193, now pending before this Court.

The Government's contention that because the "facilities or privileges" regulations have been in their present form since 1940,[36] Congress is deemed to have approved the asserted prohibition of the convenience doctrine by such regulations for FICA and FUTA tax purposes, simply does not bear analysis. First, the Government has continuously recognized the applicability of the convenience doctrine to FICA and FUTA wage determinations by regulation or published ruling from 1936 to 1962. Regulations 90, Art. 207, issued in 1936, stated the convenience test to apply to the unemployment tax; S.S.T. 110, 1937-1 Cum. Bull. 440, held the test to be applicable for both FICA and FUTA taxes with respect to "supper money"; S.S.T. 302, 1938-1 Cum. Bull. 456, stated the convenience test to apply generally to meals for FICA and FUTA taxes; and Revenue Ruling 57-471, 1957-2 Cum. Bull. 630, held that S.S.T. 302 was "still in full force and effect," although with some exceptions not applicable to Petitioner. Thus, contrary to the Government's claim of an "unbroken line of published rulings, beginning . . . in 1940" (Gov't Br. 30) and a "consistent" reaffirmation of a difference between the meaning of "wages" for FICA, FUTA and income tax withholding (Gov't Br. 31), it was not until 1962, twenty-two years after the issuance of the "facilities or privileges" regulations as currently worded, and eight years after the enactment of the 1954 Internal Revenue Code, that the Govern-

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[36] The suggestion (Gov't Br. 25) that the change in Regulations 106 and 107 in 1940 to omit the convenience of employer language was occasioned by the Social Security Act Amendments of 1939 is erroneous; the definition of "wages" as being "all *remuneration* for employment, including the cash value of all *remuneration* paid in any medium other than cash" (emphasis added) was unchanged by the 1939 Amendments.

ment first announced that it considered the convenience doctrine to be after 1962 "*no longer* a test for Federal employment tax purposes." [37] With this history, it is difficult to see how Congress could have even understood the Government's present position as to the purported effect of the "facilities or privileges" regulations, let alone have approved such effect.

Second, it is clear that the Congress as recently as 1978 did not understand the "facilities or privileges" regulations to mandate FICA and FUTA taxability of an item which is excluded from the income of an employee.[38] In sum, the Government's claim that these regulations have "for more than 40 years . . . consistently rejected the applicability of the convenience-of-the-employer exclusion to the definition of 'wages' " [39] and are therefore entitled to "special deference" due to Congressional approval [40] has a hollow ring.

The Government's reliance on *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (C.A. 9th, 1943) is also misplaced.[41] The Ninth Circuit did *not*

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[37] Rev. Rul. 62-150, 1962-1 Cum. Bull. 213. The Government continues to recognize the convenience test as being applicable to *one* employment tax, i.e., withholding on income tax. See Gov't Br. 28-29.

[38] See Pet. Br. 12-13, fn. 10. The Government's response (Gov't Br. 42, fn. 35) to this colloquy of Senators Dole and Long merely reinforces our position that the Government misperceives the Congression view of the treatment of noncompensatory meals and lodging for FICA and FUTA tax purposes. It is clear that they thought that if meals and lodging were furnished for the convenience of the employer, they necessarily were not remuneration subject to income tax in the hands of the employee or subject to FICA, FUTA, or income tax withholding.

[39] Gov't Br. 26.

[40] See Gov't Br. 19-20.

[41] The Government's reference (Gov't Br. 22, fn. 17) to two state unemployment cases, *California Employment Commission* v. *Black*

state that the convenience of the employer test was inapplicable to social security taxes; it merely stated the *possibility* that "what might not be taxable income for income tax purposes might constitute wages under the provision of the Social Security Act." 138 F.2d at 465. The court never concluded this to be the case. Instead, the court's decision was based on the point that a 50% differential in cash compensation to the particular workers receiving board and lodging "strongly indicates that board and lodging were part of the wages and *not merely for the convenience of the employer.*" 138 F.2d at 466. (Emphasis added.) Clearly, the Ninth Circuit applied the convenience of the employer test to the meals and lodging involved in that case and determined that factually such meals and lodging failed to meet the requirements of the test because they were furnished in lieu of additional cash.[42]

The Government asserts that Regulations 90 and published rulings applying the convenience test were

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Foxe Military Institute, 43 Cal. App. 2d 868, 110 P.2d 729 (App. Dep't Super. Ct. 1941), and *Worthington Constr. Co.* v. ***Employment Sec. Div., A.D.L.,*** 413 P.2d 929 (Alaska, 1966), provide no additional support. In ***Black Foxe,*** a decision of the state employment commission finding on the facts that meals and lodging were compensatory and ***not*** for the convenience of the employer was upheld. The holding in ***Worthington*** by the Alaska Court relied solely on dicta in ***Black Foxe*** and ***Pacific American Fisheries*** as authority and has no independent basis apart from those cases.

[42] *Goldsboro Christian Schools, Inc.* v. *United States,* 436 F.Supp. 1314 (E.D.N.C., 1977), subsequent opinion 43 A.F.T.R.2d (P-H) ¶ 79-473 (E.D.N.C., 1978), aff'd per curiam, No. 80-1473 (C.A. 4th, 1981), was also decided on its facts, with the district court finding that off-campus residences provided by a school to certain of its teachers were ***not*** provided for the convenience of the employer but rather as additional remuneration. The value of such residences were therefore taxable as "wages" for FICA, FUTA and withholding on income taxes.

"short-lived"[43] and do not "undermine"[44] the Government's position herein. The Government also seeks to bolster its position by pointing out that although Regulations 90 specifically adopted the convenience test for the unemployment tax, Regulations 91, applicable to the social security tax, did not.[45] In response, the Government's analysis in S.S.T. 302 of this situation is worth noting. After citing Article 207 of Regulations 90 which set forth the applicability of the convenience test, S.S.T. 302 stated (1938-1 Cum. Bull. at 457):

> "Article 14, Regulations 91, promulgated under Title VIII of the Act, contains provisions which, while not identical, have been given a *like* interpretation." (Emphasis added.)

Contrary to the Government's repeated suggestion that meals and lodging for the convenience of the employer have been treated as subject to FICA and FUTA tax by the Government for "more than 40 years"—from 1940 on (Gov't Br. 5, 7, 8 (twice), 10, 17, 20, 26, 30, 33)—*the Government's "short-lived" recognition of the convenience doctrine for FICA and FUTA purposes in fact spanned twenty-six years* from 1936 with the issuance of Regulations 90, *to 1962* with the revocation of S.S.T. 302 by Revenue Ruling 62-150, 1962-2 Cum.

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[43] Gov't Br. 25.

[44] Gov't Br. 26-27.

[45] Regulations 91, Art. 14, in pertinent part, stated:

> "Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees."

The "convenience of the employer" test, though not specifically mentioned, would appear applicable even under this language. Social Security Board Regulations 2, Art. 13 (Fed. Reg. July 23, 1937, p. 1526, 1530), had the identical language.

Bull. 213. We submit that whatever weight might otherwise be given by this Court to current administrative interpretations—whether by regulation or ruling—is not warranted in this case due to both this sustained recognition of the convenience test and the inconsistency by the Government in its treatment of the convenience test in the context of FICA, FUTA and withholding taxes, all occurring without any change whatsoever in the underlying statutes. The Government is not merely changing the "interpretation" of "wages" in light of administrative experience" as it suggests (Gov't Br. 27), but instead is asserting its ability to determine by administrative fiat something to be "wages" one day, and not be "wages" another day, without Congressional approval. The decision of the court below improperly enables the Government to do so and should therefore be reversed.

C. Noncompensatory Meals and Lodging That Are Excluded From Income Are Similarly Excluded From Wages For FICA and FUTA Tax Purposes

The Government claims that the convenience of employer doctrine is inapplicable to FICA and FUTA taxes due to a lack of "specific statutory or regulatory authority." (Gov't Br. 29.) Petitioner submits that, given the *sixty-two* year history of this doctrine—already established by cases and rulings for thirty-five years before being codified in 1954 as Section 119 of the Internal Revenue Code—and the fact that "wages" (merely one type of income) was chosen by Congress as the tax base for all four "employment" taxes, and defined in substantially identical terms for all such taxes, the convenience doctrine *is* applicable in determining whether meals and lodging are remuneration and thus "wages" for FICA, FUTA, and withholding tax purposes in the absence of contrary *Congressional* authority. It is unclear why the Government is so hostile to the application of the convenience test in

employment tax determinations. Nowhere is there any indication in any legislative history that Congress intended such hostility. The social purposes described at length by the Government in its brief as justifying the rejection of the convenience test, in fairness, provide no basis for treating a noncompensatory item as wages for one employment tax, and not as wages for another, in the absence of a specific statutory distinction, when Congress took pains to define "wages" for all employment taxes in such substantially identical terms. There is simply no basis for the Government's rejection of this test in the absence of Congressional approval.[46]

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[46] As indicated in Petitioner's opening brief (p. 34), the basis for excluding noncompensatory meals and lodging from "wages" is consistent with the Government's recognition that expenses incurred directly by an employer which, if paid by his employees would be deductible by such employees as ordinary and necessary travel expenses, are not "wages" for all employment tax purposes. See Rev. Rul. 76-71, 1976-1 Cum. Bull. 308. In this connection, there is no meaningful distinction between a driller in Petitioner's employ (who must maintain his own lodging facilities ashore for use when he is off-duty) being furnished food and lodging while working on an offshore rig for a 10-day shift, and a trainman (who must maintain his own lodging facilities somewhere when he is off-duty) being furnished food and lodging while working at his place of duty on the train which the Government recognizes would be free of FICA and FUTA tax. See Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, Rev. Rul. 75-432, 1975-2 Cum. Bull. 60, and Rev. Rul. 76-71, *supra*. Both the driller and the trainman are away from their respective homes on business travel. The reason for exclusion of travel expenses from taxable "wages" for *all* employment tax purposes, as recognized by the regulations, necessarily rests upon the very reason cited by this Court in *Kowalski* for exclusion of meals and lodging for the convenience of the employer from "wages" for income tax purposes:

> ". . . though there was an element of gain to the employer, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated

The Government makes no attempt to reconcile its stated recognition in *Royster Co.* v. *United States,* 479 F.2d 387 (C.A. 4th, 1973), that "the term wages has the same meaning for all of the employment taxes,"[47] with its present position that noncompensatory meals and lodging are "wages" for social security tax purposes but not "wages" for income tax withholding purposes except to suggest that different regulations applied in *Royster* than in this case; as pointed out in Petitioner's Brief (p. 40, fn. 46) the *only* regulations referred to in the Government's brief in *Royster* (when it conceded that "wages" have the same meaning for FICA, FUTA and income tax withholding) are the *very* regulations involved here. Nor does the Government make any serious attempt to reconcile its repeated assertions to the Court of Claims and the court below that *Central Illinois,* involving the definition of "wages" in the context of income tax withholding, was "squarely in point" with wage determinations in FICA and FUTA tax cases and would have a "direct impact" thereon,[48] with its present position (Gov't Br. 8, 33) that *Central Illinois* "does not bear upon the FICA and FUTA tax question presented in this case." This Court determined in *Central Illinois* that the "expansive and sweeping" definition of "wages" urged by the Government there as here as including all personal benefits arising out of the employment relationship was inconsistent with the intent of Congress in selecting such a "narrow and precise" standard for the employment tax base; the Government nonetheless ignores this determination and once again urges this

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and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment." *Commissioner* v. *Kowalski,* 434 U.S. 77, 89 fn. 21 (1977).

[47] See Pet. Br. 18-19.

[48] See Pet. Br. 19-20.

Court to redefine "wages" to include a "broad range of personal benefit items",[49] without regard to whether such items are remuneration for services and thus "wages" as required by statute. The Government also claims, erroneously, that this Court's decision in *Central Illinois* "turned on" a "pertinent Treasury Regulation." (Gov't Br. 33.)[50] If *Central Illinois* had been that simple, this Court would hardly have gone to such great lengths to reject the ' expansive and sweeping definition of wages" urged there (and here) by the Government, finding it to be inconsistent with Congressional intent of setting forth an "intentionally narrow and precise standard," or to explain that "wages" is a narrower term than "income." It more accurately appears that the Court's decision turned on an analysis of the definition of "wages" as set forth in Section 3401 of the Internal Revenue Code, and not on regulations, a reading that is supported by the concluding statement in the majority opinion (435 U.S. at 33):

> "This is not to say, of course, that the *Congress* may not subject lunch reimbursements to withholding if in its wisdom it chooses to do so by expanding the definition of wages for withholding. It has not done so as yet. And we cannot justify the Government's attempt to do so by judicial determination." (Emphasis added.)

The Government's attempt to deny that the employee FICA tax is in fact an *income* tax by suggesting[51] that

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[49] See Gov't Br. 16-17.

[50] The Government makes a similar erroneous claim as to the impact of regulations other than those involved here, in *Royster Co.* v. *United States*, 479 F.2d 387 (C.A. 4th, 1973). See Gov't Br. 34, fn. 30. Such regulations had absolutely no discernible impact as the Fourth Circuit did not refer to any regulation whatsoever at any point in its decision and the only regulation brought to its attention by the Government was that involved here. See Pet. Br. 40, fn. 46.

[51] Gov't Br. 30, fn. 22.

Helvering v. *Davis,* 301 U.S. 619 (1937), characterized such tax as other than a regular *income* tax subject to the general rules applicable to the determination of income is without foundation. In context, the use of the word "special" as applied by the Court to the FICA income tax appears to have no independent significance (301 U.S. at 634-635):

> "Title VIII. lays another excise upon employers in addition to the one imposed by title IX. (though with different exemptions). It lays a *special income tax* upon employees to be deducted from their wages and paid by the employers. . . . The plan of the two titles will now be summarized more fully.
>
> "Title VIII. as we have said, lays two different types of tax, an '*income tax* on employees,' and 'an excise tax on employers.' The *income tax* on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid 'with respect to having individuals in his employ,' and, like the tax on employees, is measured by wages. Section 804. . . . The *income tax* on employees is to be collected by the employer, who is to deduct the amount from the wages 'as and when paid.' Section 802(a). . . . The proceeds of both taxes are to be paid into the Treasury like internal revenue taxes generally, and are not earmarked in any way. Section 807(a)." (Emphasis added.)

The further attempt of the Government to distinguish the conflicting wage determinations of the court below on the grounds that meals and lodging furnished for the convenience of the employer are FICA and FUTA "wages", but are not "wages" for income tax withholding purposes solely because they are not taxable income to the employee,[52] fails to account for this Court's determination in Central Illinois ***that the meals in issue there were not "wages" for withholding***

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[52] See Gov't Br. 28-29.

tax purposes even though they were admittedly income to the employees. The inescapable fact is that the statutory definition of "wages" is the same for FICA, FUTA and withholding taxes. If noncompensatory meals and lodging are not "wages" within the definition of withholding on income tax, perforce they are not "wages" within the FICA and FUTA tax definition. An item is excluded from "wages" if it is not income, as "wages" is merely one form of income; an item is also excluded from "wages" if it is not remuneration for services, but may still be taxable income to the employee as in *Central Illinois.* Within this context, the holding of the court below that noncompensatory meals and lodging, acknowledged to be excluded from income and not "wages" for income tax withholding, are nonetheless remuneration for services and thus "wages" for FICA and FUTA tax purposes, is in error.

There is no justification for the inconsistent and conflicting treatment accorded noncompensatory meals and lodging by the Government.[53] The resulting complexities that would be added to the employer's recordkeeping responsibilities by such treatment are substan-

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[53] Had Petitioner incurred the additional expense of transporting its crews back to shore so they could obtain meals and lodging each day at their own expense, it is clear that the added transportation expense so incurred by Petitioner would not be "wages" to its employees. Such additional cost would have been approximately $25 per day per man, as opposed to the $6 per day per man cost actually incurred by Petitioner in providing meals and lodging on the drilling rig (See Pet. Br. 3). Based on comparative cost alone, prudent business economy would dictate that the less expensive alternative be selected as a convenience, and savings, to the employer. It is plainly unreasonable for the Government to assert that a payment of "wages" result from the selection of the less costly alternative but not from the more costly, when the alternatives are functionally identical employment costs.

tial. Additionally, the potential for dispute as to particular items received by an individual employee and the value thereof to be charged to that employee for FICA and FUTA—but not income tax withholding—purposes is significant.[54] This by no means comports with the expressed intent of Congress that the "methods of collection, payment, and administration of the withholding tax" were to be "coordinated generally with those applicable to the Social Security tax." [55] Congress created the identical taxable base for all four employment taxes and the Government is without authority to alter such base. The decision of the Court below should be reversed.

Respectfully submitted,

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[54] Contrary to the Government's suggestion (Gov't Br. 36-37, fn. 32), the "fair value" of asserted taxable items is not "commonly" resolved by the Internal Revenue Service consistent with state-established standard values. A case in point can be found in *Hotel Conquistador* where notwithstanding that the Nevada Wage and Hour Law (Chap. 609, Nev. Rev. Stat.) provided that for minimum wage purposes, meals were to be valued at $.35, $.45 and $.75 for breakfast, lunch, and dinner, respectively, and Rule 1 of the Nevada Employment Security Department specified respective values of $.25, $.35 and $.45, the Government nonetheless asserted that the meals in issue had a value of $1.25 each. See *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d at 1350.

[55] See pp. 7-8, *supra*.

No. 80-780

IN THE

Supreme Court of the United States

October Term, 1980

ROWAN COMPANIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE FOODSERVICE AND LODGING INSTITUTE

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BRIEF OF *AMICUS CURIAE* THE FOODSERVICE AND LODGING INSTITUTE

The Foodservice and Lodging Institute as *amicus curiae* supports the position of the petitioner, Rowan Companies, Inc., urging reversal of the decision of the United States Court of Appeals for the Fifth Circuit in this action. Since the Foodservice and Lodging Institute is in full agreement with the legal analysis and conclusions expressed by the Rowan Companies in its petition, the *amicus* will herein restrict its comments to presentation of additional factual considerations and an analysis of the issue insofar as that issue impacts upon the restaurant, food service, hotel and motel industries.

INTEREST OF THE AMICUS CURIAE

The Foodservice and Lodging Institute is a trade association incorporated in the District of Columbia. Its thirty-four members are multi-unit, multi-state restaurant, food service, hotel and motel companies. Members and their franchisees operate approximately thirty-eight thousand (38,000) establishments and employ approximately two and one-half million (2,500,000) individuals.

Many member companies, for their own convenience and business purposes set out more fully below, allow employees to eat snacks or meals immediately before, during, or after their work shifts, at no direct charge. The meals are of small value and form only a very small part of the total benefits received by employees, comparable to the benefits of company-supplied uniforms or aesthetically pleasant work environments. Moreover, employees such as cooks must as a part of their work responsibilities sample food as it is prepared. Waitresses and waiters must sample food in order to know how to describe requested items and daily specials to customers.

The Internal Revenue Service has, with respect to some member companies, asserted that the value of employee meals is subject to social security and unemployment taxes. This assertion runs counter to a practical view of such meals based on experience in the restaurant industry, which indicates that the meals are not remuneration for services. It also runs counter to the result which would be reached through a thorough analysis of the situation in light of the definition of wages, as set out clearly and simply by the Court of Claims in *Hotel Conquistador* v. *United States, infra.* Employers in the restaurant and food service industry can draw no practical guidance whatsoever from either

the Treasury Regulations or the appellate opinion herein to be reviewed, and thus seek an opinion from this Court which will prove useful when applied to their particular facts and circumstances.

Reversal of the Fifth Circuit's decision, supported by this *amicus,* would allow refunds of a small part of employment taxes paid, to some employers and to their employees who cannot practicably represent themselves in this matter. More importantly, however, employers would have guidance on future tax collection obligations in this area.

SUMMARY OF THE ARGUMENT

The decision below should be reversed as an improper interpretation of the operative statutory provisions. "Wages" must be construed consistently for social security, unemployment, and withholding tax purposes.

The decision below should be reversed because the holding, affirming the Internal Revenue Service's erroneous assertion of taxability, ignores the criteria which determine taxability by the terms of the statutes and applicable regulations. The determination of "wages" and of "remuneration for employment" requires examination of the employer's purpose in providing the facilities alleged to be wages. Facilities which are not remunerative in nature are not wages.

ARGUMENT

I. SIMILAR WAGE DEFINITIONS SHOULD BE INTERPRETED IN LIKE FASHION ABSENT CONGRESSIONAL INSTRUCTIONS TO THE CONTRARY

At issue in this action is whether the Internal Revenue Code and related Treasury Regulations require payment of social security and unemployment taxes on the value of certain facilities of small value provided by employers for their own convenience and business purposes. Such taxation would be premised on the theory that such facilities are wages paid to employees for purposes of the Federal Insurance Contributions Act, I.R.C. 3101 *et seq.* [hereinafter, "FICA"], and the Federal Unemployment Tax Act, I.R.C. 3301 *et seq.* ["FUTA"], despite the fact that the facilities are admittedly not wages to employees for withholding tax purposes nor income to the employees for federal income tax purposes. The appropriate FICA and FUTA definitions of wages, with emphasis on the operative provisions, are as follows:

> Wages — For purposes of this chapter, the term "wages" means all *remuneration for employment,* including the cash value of all remuneration paid in any medium other than cash; . . .
>
> I.R.C. 3121(a), 3306(b)

The Treasury Department has interpreted this language to mean:

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration

> for employment if such facilities or privileges are *of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees.* The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.
>
> Treas. Reg. 31.3121(a)-1(f), 31.3306(b)-1(f)

The Internal Revenue Service concedes that the facilities in issue are not "wages" for federal income tax withholding purposes despite the fact that the language of the withholding section of the Internal Revenue Code, section 3401(a), is virtually identical to the Code sections here in issue.[1] Moreover, since provided "for the convenience of the employer", the facilities furnished (meals and lodging) are not income; I.R.C. 119.

The Fifth Circuit found nothing objectionable in the Internal Revenue Service's inconsistent interpretations of wages for purposes of different parts of the Internal Revenue Code, and further agreed with the Service's construction of the terms of the Code and the appropriate Treasury Regulations as taxing, for social security and unemployment purposes, employers and employees on the value of facilities available to employees in the course of the employer's business as if

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[1]Brief for the United States on Petition for Writ of *Certiorari* at 2, n. 2.

such facilities were wages paid to the employees.

Implicit in the Fifth Circuit's holding are several important concepts: (1) that the employer's purpose in providing the meals was irrelevant; (2) that the facilities were an appreciable part of the total benefits to employees in the course of employment; and (3) that the Code and regulatory provisions cited above were definite enough to justify the imposition of tax liability on an employer who in essence is serving as a surrogate tax collector.

The court below erred in construing the identical terms of the income tax withholding and FICA and FUTA tax "wage" definitions differently. The remedial purpose of social security and unemployment legislation, cited below as in some way justifying such disparate treatment, 624 F.2d at 706, does not justify such a distinction. The court below ignored the fact that its overbroad definition of wages does not in any way effect the remedial purposes of the statute; it merely alters the level of governmental activity in effecting that purpose. While a broad definition obviously produces a larger fund from which benefits may be paid out, it also imposes a greater tax on employees, the intended beneficiaries. It is not for the Internal Revenue Service to enrich the social security trust fund by enlarging the definition of "wages" enacted by Congress. The extent of the basis for both taxes and benefits, and the distribution of available funds among beneficiaries, are legislative decisions. The Fifth Circuit improperly ignored the most definite evidence of legislative itent available, the use of substantially identical language in the FICA, FUTA and income tax withholding sections of the Code. While the Court below is correct in its assertion that the same terms *need not* mean the same thing, the fact that they were enacted nearly

contemporaneously, with extensive definitional language that is substantially identical, re-enacted as parts of the same chapter within a unified code, and are to be administered by the same agency, is strong evidence of identical legislative intent.[2] The converse proposition, that statutory provisions *do not* mean the same thing because they *need* not mean the same, is an obvious *non sequitur*.

II. A CHARACTERIZATION OF FACILITIES AS WAGES WHICH DOES NOT CONSIDER WHETHER THE FACILITIES WERE PROVIDED FOR A NON-REMUNERATIVE PURPOSE IS INVALID

The Fifth Circuit implicitly denied weight in its decision-making to the various factors indicative of the non-remunerative purpose of the facilities in issue. Where "remuneration for employment" is the threshhold determination, the employer's purpose in providing facilities, their value, and their relation to overall benefits received in the course of employment are decisive. The court's finding that the facilities furnished in effect constituted remuneration for employment is incompatible with the fact, conceded by the Internal Revenue Service, that the facilities were provided for the convenience of the employer. The Rowan Companies' alternative to providing such facilities was to provide transportation back to shore each day, at a cost four times that of providing meals and lodging. (The value of that wasteful expenditure would not have been taxed). Similarly, had the Rowan Companies, and its employees themselves, viewed the

[2]Congress stated its intent to use the same "wages" basis for withholding tax purposes as that used for social security tax purposes, in enacting the predecessor of the current withholding provisions. S. Rep. No. 1631, 77th Cong., 2nd Sess. (1942); H.R. Rep. No. 268, 78th Cong., 1st Sess. (1943); S. Rep. No. 221, 78th Cong., 1st Sess. (1943).

meals and lodging provided as a part of remuneration for services, one would expect that employees employed in similar capacities ashore would have received either similar facilities or their equivalent value in cash[3]; yet that was not the case. While the "convenience of the employer" test has not been made dispositive here, as in the context of income, I.R.C. 119, it is one of the crucial factors in a determination of what constitutes "remuneration for employment".

Facilities of significant value provided to employees for the employees' benefit and intended as remuneration for services performed are wages for FICA and FUTA purposes. However, facilities provided to employees which incidentally benefit employees but are demonstrably provided for the employer's convenience and primary benefit (e.g. shorter break periods, uniform control, flexible scheduling, etc.) are not by reasonable construction *remuneration for employment* and therefore are not "wages" to employees. Even the Treasury Regulations on this subject are capable of such a reasonable interpretation, consistent with withholding provisions, in that they provide that non-cash items will not be considered wages,

> . . . if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees . . .
>
> Treas. Reg. 31.3121(a)-(1)(f), 31.3306(b)-(1)(f)

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[3]*Cf. Pacific American Fisheries* v. *United States*, 138 F.2d 464, 465 (9th Cir. 1943).

The criteria referenced require an analysis of the purpose of the employer in providing facilities to workers. In fact, each criterion listed relates to the benefit of the *employer* in providing such facilities to his employees. While the court below rejects the notion that any "convenience of the employer" criterion is relevant to FICA and FUTA wage definitions, the Treasury Regulations on point contain criteria such as "worker efficiency" which require that a court ascertain whether or not the employer provided facilities in order to promote worker efficiency or instead whether the facility was provided as "remuneration for employment." The court below, in rejecting any "convenience of the employer" criterion, concluded that the sole criterion for ascertaining whether facilities would constitute wages for FICA and FUTA purposes was a determination of whether they were of "appreciable value". Surprisingly, however, the opinion of the Fifth Circuit does not even make casual reference to the value of the facilities furnished to the Rowan Companies' employees.

III. A WAGE DEFINITION RELYING PRIMARILY ON "VALUE" WOULD GRANT I.R.S. AN UNAUTHORIZED HUNTING LICENSE

By plain implication, the court below was of the opinion that lodging on a ship and three cafeteria-style meals a day, together worth six dollars, given to employees working ten twelve-hours shifts in ten consecutive days sixty miles offshore, were "an appreciable part of the total remuneration" of those employees; and that the meals were, under the court's interpretation, not "offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees". While such a result seems inconceivable

when one considers the overwhelming business necessity in providing such facilities, their small value in comparison to employees' wages, and the fact that employees on shore received no such benefits, nevertheless, the court's blind adoption of the Internal Revenue Service's interpretation under the talisman of deference to administrative expertise leads to just that conclusion.

It is apparent that such cursory, imprecise judicial review may result in analogous taxability of any facility or benefit furnished by an employer, even those traditionally not so taxed and certainly not within the contemplation of Congress in enacting the term "wages". Nearly every imaginable condition of employment is of some value or benefit to employees. By allowing the Internal Revenue Service to focus on such value, however incidental or ephemeral, *without due regard for the criteria of "remuneration for employment" and "an appreciable part of remuneration"* both contained within the relevant statutory provisions (and their subsidiary considerations: value of facilities, value of facilities in relation to overall benefits, and employer's purposes in furnishing the facilities), the Fifth Circuit's approach would allow inclusion in wages of the value of a convenient job location, of an office window with a pleasant view, of an air conditioned office, and so on *ad infinitum*. (Such "values" also raise obvious administrative difficulties in valuation, especially where individual tastes are concerned).

Herein lies the crux of the *amicus* Foodservice and Lodging Institute's concern. The method of determining taxability of facilities followed by the Internal Revenue Service (i.e., apparently arbitrary inclusion of facilities in wages under the guise of an

open-ended regulation which has been characterized as a "hunting license", *Hotel Conquistador, infra,* 597 F.2d at 1354) and given the approval of the Fifth Circuit (i.e., through deference to administrative decisions), may lead to taxation of benefits in numerous situations both similar and dissimilar to the circumstances presented herein. Of obvious concern to this *amicus* is the typical restaurateur. While meals provided to employees are of the most pressing concern to the restaurant industry, proper consideration of that type of benefit should be prefaced by mention of facilities not thus far alleged by the Internal Revenue Service to be remunerative, such as reimbursement to employees for maintaining uniforms and the aesthetically pleasant atmosphere of a restaurant. An employer willingly incurs such costs to further his business interests. The incidental benefits to employees, insofar as employees need not incur "wear-and-tear" on their own street clothing and as they have a comfortable, pleasant work environment, are not subject to the taxes here in issue.[4]

The operators of restaurants or food service units, or comparable facilities in connection with the operation of a hotel or motel, allow their employees to partake of the establishment's food and beverage items at no direct charge as a matter of custom, convenience and necessity. Employers are motivated to follow this practice for several reasons. As the amount of food and beverages consumed by employees is negligible in comparison to the volume of such items sold in the course of business, and as the employees typically prepare and serve meals for themselves while not

[4]The Internal Revenue Service has specifically ruled that uniform maintenance allowances are not remuneration for services, in the withholding tax context; Rev. Rul. 72-110, 1972-1 C.B. 24. The Service has never attempted to tax the value of employees' work environments in the context here presented.

performing assigned duties, the incremental cost to the employer is a small price to pay for the resultant good will of employees. The value of the meals received by employees is small and constitutes a negligible part of the total benefits they receive in the course of employment.

An employer attempting to alter the traditional practice would find himself faced with employee discontent (with its attendant inefficiencies due to lower morale and higher employee turnover rates) far outweighing any costs in providing employee meals. Furthermore, some employees such as chefs and cooks must consume food products during the course of their workday in order to be familiar with their work and ensure its consistency and quality; others, such as waiters, waitresses, or counter personnel must be familiar with the menu in order to answer patrons' inquiries and make recommendations of particularly good dishes on a given day. Providing for on-premises employee meals also permits management to schedule variable break periods adjustable according to fluctuations in business throughout the day and to schedule shorter break periods than otherwise possible because employees need not leave and are encouraged to remain on the premises for their meals, and need not take time to change out of and into uniforms where management policy is not to allow uniforms to be worn off the premises. Preservation of these employer prerogatives is critical to a successful restaurant operation. Finally, employee meals are good public relations: what diner would patronize an establishment when the cook and waitress eat elsewhere? From the employees' viewpoint, the food and beverages consumed "on the job" are of small value and a minor benefit in comparison to their cash wages. In fact, a cook or employee in charge of quality control would not regard the ability to consume food on the job as any

benefit at all; sampling food is part of the job. Even where the food consumed by a cook is of some "appreciable value" to the ordinary restaurant patron, it would be absurd to subject food consumed by the chef as part of his job to FICA and FUTA taxes. "Value" is but a part of the issue; a facility of "appreciable value" that is provided to employees for the employer's convenience is simply not "remuneration for employment" as that terminology is used in the FICA and FUTA statutes.

The value of facilities provided, while not dispositive of the FICA and FUTA wage question, is of course relevant. The findings of the Court of Claims in *Hotel Conquistador* v. *United States,* 597 F.2d 1348, (Ct. Cl. 1979), *cert. denied,* 444 U.S. 1032 (1980) involving the issue presently before the Court, are instructive. Food service employees therein received meals each workday worth at most (i.e., in the Internal Revenue Service's estimate) $1.25; this value was approximately 8.3 percent of employees' wages. These meals were provided in order to allow for shorter meal breaks and to preclude the wearing of uniforms off the premises. The court rejected as fictitious the idea that meals were a part of some total package of remuneration offered for services, and the idea that the meals were significant enough to have any effect on the cash wages offered to employees' overall wages and benefits, and the are not wages, 597 F.2d at 1348 *et seq.* (Nichols, J., for the court; Davis, J., concurring in the result).

A comparison to *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (9th Cir. 1943), alleged to conflict with *Conquistador,* highlights the facts relevant to the "wages" determination. The employer was required to furnish board and lodging under the terms of a contract fixing the value of those facilities, and

employees who did not receive such facilities received additional cash wages instead. 138 F.2d at 465. "The value of the lodging and sustenance furnished constituted a very substantial portion of this remuneration." *Ibid.* The facilities were not furnished for the convenience of the employer. *Id.* at 466. Under such facts meals constitute wages.

In advising the Court on this issue the *amicus* can do no better than to commend strongly the method of analysis followed by the Court of Claims in *Hotel Conquistador* v. *United States, supra.* That is, the determination of whether facilities furnished by an employer constitute wages depends on the value of the meals, the value of the meals in relation to the employees' overall wages and benefits, and the employer's purpose in providing the facilities.

IV. EMPLOYERS AS SURROGATE TAX COLLECTORS REQUIRE GUIDANCE

The necessity for express guidance from this Court on this issue cannot be overemphasized. The employer is in the first instance a surrogate tax collector, of both his own and his employees' taxes. Further,

> Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative.
>
> *Central Illinois Public Service Co. v. United States,* 435 U.S. 21, 31 (1978)

Finally, express guidance as to the method of analysis in the instant action is necessary because the Court's opinion will determine taxability of facilities in literally

innumerable situations in practically every industry in the nation. Affirmance of the decision below would encourage the Internal Revenue Service to expand its activities in investigating the taxability of facilities without foreseeable limit, certainly far beyond the scope implicit in Congress' use of the "intentionally narrow and precise" term, "wages", *Central Illinois,* 435 U.S. at 31. Affirmance would reward the Internal Revenue Service for imprecision in its regulations, and would provide no guidance to employers in factual situations which are not closely analogous to those before the Court.

CONCLUSION

For the foregoing reasons the decision below, that meals and lodging furnished to offshore drilling employees within the factual circumstances set out above constitute wages, should be reversed.

Respectfully submitted,

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March 5, 1981

No. 80-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF INDIVIDUAL HOTEL EMPLOYEES IN SUPPORT OF THE PETITIONER

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UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF INDIVIDUAL HOTEL EMPLOYEES IN SUPPORT OF THE PETITIONER

Mountain States Legal Foundation respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation, is a nonprofit, membership public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom.

2. The named individual hotel employees represented by the Foundation in this *amicus* brief will be directly affected by the outcome of this litigation because they are presently required to pay Social Security taxes on the value of meals provided by their employers.

3. The *amici* have received the consent of both parties to the filing of this brief.

4. Unforeseeable delay was encountered in the preparation of this brief, primarily because of the necessity for gaining approval of the Foundation's Board of Directors and all *amici* to participate in this litigation through the filing of this brief.

5. On March 5, 1981, the Foundation filed a timely request for additional time within which to complete printing and editing of this brief.

6. On March 12, 1981, Mr. Alexander Stevas, Clerk of this Court, informed counsel for the *amici* that the only available means for seeking an extension of time was by addressing this Motion for Leave to File to this Court.

For the foregoing reasons, the Foundation respectfully requests that its Motion for Leave to File the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF INDIVIDUAL HOTEL EMPLOYEES IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICI CURIAE

The individual *amici* are employees who have had Social Security (FICA) taxes deducted from their wages. One segment of such FICA taxes is paid on the value of meals provided by their employers.

Each of the *amici is* employed by a hotel in Nevada. Kim Aspatore, Peter Aspatore, Virginia Hammond, Sarah Johnson, Donna Milcarek, Jean Miller and Michael Varhola are employed by Circus Circus, Inc., in Las Vegas, Nevada. Daniel J. Becan, John Brawn, Alan K. Johnston, Timothy McRee and Thomas Miller are employees of the Sahara Hotel in Reno, Nevada. In the course of employment, meals are provided to the *amici* by their employers without charge.

The Nevada hotel and casino industry was the subject of a recent Court of Claims ruling on the meal value

issue, *Hotel Conquistador, Inc. v. United States,* 597 F.2d 1348 (Ct. Cl. 1979), *cert. denied,* 444 U.S. 1032 (1980). The Court of Claims ruled that meals provided for the convenience of the employer are not subject to FICA and Federal Unemployment Tax Act (FUTA) taxes. The facts described in the *Hotel Conquistador* decision are similar to those prevailing throughout the industry. Most hotel employers furnish meals to their employees as a convenience to the employer when the employees work a full shift. Meals for service employees are ordinarily served in facilities separate from those frequented by customers.

The convenience of the employer is served in several ways by provision of meals. Short lunch periods (30-45 minutes) are feasible when employees eat on the premises, but not if they must go elsewhere for food. Many hotel employees (including many of the *amici*) are required to wear uniforms on the premises, but are not allowed to wear them while eating elsewhere. In order to enforce this rule, additional time would be necessary for eating off the premises.

Although the provision of meals is an item that has been specified in some union contracts, the hotel managements provide meals for both union and non-union employees. In each of the hotels represented by the *amici,* the Internal Revenue Service has not challenged the assertion that the meals are provided for the convenience of the employer and thus not subject to withholding for income tax purposes. *See Hotel Conquistador,* 597 F.2d at 1350.

The *amici* named herein are not directly affected by applicability of the Federal Unemployment Tax Act, since only employers are liable for the unemployment tax. They are unaffected by FUTA interpretation also because of two practical matters: first, because FUTA tax is imposed only on the first $6,000 of wages; I.R.C. § 3306; which is ordinarily exceeded by full-time employees, even those earning

the minimum wage, and second, because the workers' FUTA benefits are unaffected by the employer's contribution level. *See generally* I.R.C. § 3304. The same legal principles would appear to apply to FICA and FUTA taxes.

Letters indicating the consent of the parties to the participation of these *amici* will be filed under separate cover with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

This Court has already ruled, in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978), that reimbursement for meals provided to employees are not included in wages for income tax withholding purposes. The *amici* argue that the same result should be reached as to the value of meals for FICA and FUTA purposes, since the relevant definition of wages is virtually identical in all three sections of the Internal Revenue Code. Such an interpretation of the statute would further the goal of simplicity and uniformity in administration of the tax laws for the thousands of employers and employees affected. It is consonant with applicable rules of statutory construction and with past judicial rulings. The *amici* herein will not attempt to reiterate the administrative and legislative history of the Social Security Act that will presumably be fully briefed by the parties. The *amici* will focus on a few legal issues and the underlying public policies.

ARGUMENT

I. FUTURE LITIGATION WILL BE AVERTED, AND EASE OF ADMINISTRATION WILL BE FURTHERED, IF INCOME TAX DEFINITIONS ARE ADOPTED FOR F.I.C.A. PURPOSES

The *amici* urge this Court to resolve the meal tax issue in a manner that will engender the least amount of future litigation. For employees, it is exceedingly difficult to challenge FICA tax withholdings on meals. The average amount of FICA taxes paid on meal valuations is small[1] — certainly not worth the expense of individual litigation. The necessity of filing individually computed claims for refund makes a class action alternative inappropriate. Furthermore, litigants must apparently be prepared to pursue their tax cases to this Court in order to obtain a final resolution of the issue — as those who cheered the *Hotel Conquistador* decision discovered when the IRS decided not to acquiesce to the Court of Claims ruling. Thus, it is difficult for employees to resolve their meal value FICA tax liability.

Although the amount for each individual is small, the employee taxpayers are nevertheless concerned about whether such taxes are justified. The right of taxpayers to minimize their tax burdens has long been recognized in the United States. *Knetch v. United States,* 364 U.S. 361 (1960); *United States v. Isham,* 84 U.S. (17 Wall.) 496 (1873). This Court has quoted with approval the classic statement of Judge Learned Hand in *Commissioner*

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[1]Assuming a valuation of even $2.00 per meal (which is higher than the values litigated in any of the recent meal tax cases) for 250 working days per year, taxed at the prevailing rate of 6.5%, an employee's social security tax on the value of meals would be $32.50. ($2.00 x 250 x 6.5% = $32.50.)

v. Newman, 159 F.2d 848, 850-51 (2d Cir. 1947) (dissenting opinion):

> [N]obody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions.

Commissioner v. First Security Bank, 405 U.S. 394, 398n.4 (1972). Although the Social Security program may have an admirable purpose, the employee taxpayers oppose extension of taxation to cover the value of meals—particularly when these meals are not provided to them for a primarily compensatory purpose.

According to the most recent IRS version of meal taxation, the determinative criteria for taxing benefits is whether the benefits constitute an "appreciable part of income." Rev. Rul. 62-150, 1962-1 C. B. 213. The IRS then posits an unnecessarily broad rule: provision of one free meal a day is a *per se* appreciable part of income. *Id.* This characterization ignores the more meaningful consideration of whether the meals constitute payment for services, and therefore "wages" within the meaning of the FICA, I.R.C. § 3121. It also ignores the fact that the value of meals may vary greatly depending on individual eating habits, and that employees are not compensated for meals they do not eat. Thus employees might currently be expected to pay taxes on meals they did not consume.

The *amici* urge this Court to recognize applicability of the "convenience of the employer" test to the FICA tax. The test is reasonably clear and, more significantly, it has been interpreted in a substantial body of case law. Application of this established test will minimize the amount of future litigation generated in determining whether particular situations are covered by this Court's new rule.

Convenience and simplicity in administration is a commonly recognized consideration in the interpreting of

tax statutes, *Central Illinois Public Service Co. v. United States, supra.* The Court of Claims used this as one factor in determining that the value of meals should be excluded from wages for FICA and FUTA purposes, as well as from the definition of wages for income tax withholding purposes. *Hotel Conquistador, supra.* The court held that the government's attempt to define wages more broadly than income "certainly cannot be commended as facilitating the simplicity and uniformity that are so badly needed when thousands of employers are required to act as deputy tax gatherers from millions of employees." 597 F.2d at 1351.

The convenience of the employer test is consistent with the ordinary meaning of the term "wages." Wages are statutorily defined as "all remuneration for employment . . . including the cash value of all remuneration paid in any medium other than cash . . . ." I.R.C. §§ 3121(a), 3306(b), 3401(a). The commonly understood meaning coincides with the statutory meaning, i.e., that wages are compensation for services performed. The "convenience of the employer" test is rooted in this conception, since meals or lodging provided primarily for the benefit of the employer are not necessarily tendered in exchange for work performed.[2] It is significant that this exclusion from earnings for income tax purposes arose through administrative and judicial interpretation, and was not codified in I.R.C. § 119 until many years later. The basic statutory structure, in particular the definition of wages, is the same under FICA as under the Internal Revenue Code prior to the adoption of Section 119. Thus it would not be improper for the Court to adopt the common law convenience of the employer rule as the judicial construction of FICA wages.

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[2] *Commissioner v. Kowalski,* 434 U.S. 77, 85 (1977), noted that early administrative pronouncements of the convenience of the employer rule were based on the rationale that "benefits conferred by an employer on an employee in the designated circumstances were not compensation for services and hence not income." *See also Jones v. United States,* 60 Ct. Cl. 552 (1925).

II. THE RULES OF STATUTORY CONSTRUCTION INDICATE THAT THE VALUE OF MEALS AND LODGING SHOULD NOT BE CONSIDERED WAGES FOR SOCIAL SECURITY TAX PURPOSES.

A. *Ambiguities in FICA tax liability should be construed in favor of the taxpayer.*

Courts have often expressed a rule that the Social Security Act is to be liberally construed in favor of coverage, because the purpose of the old age benefits provision is "to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." *Social Security Board v. Nierotko,* 327 U.S. 358, 364 (1946). *See also Rasmussen v. Gardner,* 374 F.2d 589 (10th Cir. 1967); *Delno v. Celebrezze,* 347 F.2d 159 (9th Cir. 1965). This adage should, however, be exercised with caution. It has primarily developed in the context of lawsuits seeking entitlement to benefits, and operates on the assumption that the Social Security system differs markedly from ordinary taxation. An examination of the circumstances surrounding FICA tax liability reveals that a presumption in favor of the taxpayer is more appropriate.

Recent cases have made clear that payment into the Social Security system does not guarantee the receipt of expected benefits:

> The fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits under the Act or the conditions upon which they may be paid. Nor does an expectation of public benefits confer a contractual right to receive the expected amounts.

Richardson v. Belcher, 404 U.S. 78, 80 (1971). Although Social Security is more than a welfare program generally benefitting needy persons; *Califano v. Jobst,* 434 U.S. 47 (1977); and although it has some similarities to an insurance program; *Sims v. Harris,* 607 F.2d 1253 (9th Cir. 1979); these considerations are insufficient to justify a strong presumption in favor of Social Security taxation. From a practical perspective, Social Security differs little from an ordinary tax as to both employers and employees. Payment of the tax is mandatory, while receipt of benefits is subject to legislative discretion. *See* 42 U.S.C. § 1304, which specifically reserves congressional authority to amend the program. The worker is not entering into a contractual pension program. Furthermore, the presumption of inclusion in the Social Security system has usually been discussed by courts with regard to entirely including or excluding individuals from the program, not determining the tax liability of already covered individuals. *See, e.g., United States v. Silk,* 331 U.S. 704 (1947); *United States v. Vogue, Inc.,* 145 F.2d 609 (4th Cir. 1944).

Other aspects of the Social Security program have not received the same presumption in favor of coverage. In *Burns v. Alcala,* 420 U.S. 575 (1975), the Court noted that a presumption in favor of eligibility for the Aid to Families with Dependent Children program under the Social Security Act when the statute is ambiguous was a "departure from ordinary principles of statutory interpretation [that] is not supported by the Court's prior decisions." 420 U.S. at 580.

The tradition of interpreting tax statutes in favor of the taxpayer in case of ambiguity is strongly established in American law.

> In the interpretation of statutes levying taxes it is the established rule not to extend their provi-

> sions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

Gould v. Gould, 245 U.S. 151, 153 (1917). *Accord, McFeely v. Commissioner,* 296 U.S. 102 (1935); *Ellis v. United States,* 416 F.2d 894 (6th Cir. 1969).

The *amici* submit that, at least in the narrow situation of taxpayer liability for a small portion of FICA taxes, the presumption of broad inclusion should not apply and should be replaced by the ordinary construction in favor of the taxpayer.

B. *Prior cases support the finding that meals are not wages for FICA purposes.*

An examination of the lower court decisions on the meal tax issue illustrates the rationale for finding meal values to be outside the scope of FICA taxation. *Royster Co. v. United States,* 479 F.2d 387 (4th Cir. 1973), concerned amounts paid to salesmen to reimburse them for the cost of meals purchased by them during the day on the road. The Fourth Circuit recited the definition of wages for FICA, FUTA, and income tax purposes, and concluded "that the slight variations in the wording of the above statutes were inconsequential and that wages has the same essential meaning under all the statutes here in question." 479 F.2d at 390.[3]

The Court added that:

> We are of the opinion that the term wages is narrower than the term income as used in the income

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[3]The court also noted that the government brief expressed agreement with this proposition.

> tax provisions relating to how an individual must treat payments to him. Wages are merely one form of income.

479 F.2d at 390.

A further refinement of the definition of income led the Court to the conclusion that the meals provided by the taxpayer were not wages. The essential element of wage is remuneration for services performed. The employees in *Royster* performed no services in order to be entitled to meals. Instead, lunches were provided to save mileage expenses incurred by employees who drove home for lunch. The statutory "convenience of the employer" test was not relied upon by the court in *Royster,* but its analysis was similar. It found that meals provided for a noncompensatory purpose were not wages.

Another recent case finding that benefits are not wages for FICA and FUTA purposes is *Oscar Mayer & Co., Inc. v. United States,* 623 F.2d 1223 (7th Cir. 1980). *Oscar Mayer* again examined the question of taxation under ordinary income tax as well as FICA and FUTA. Employers were provided with automobiles for business use and were charged a small amount for personal use of the vehicles. The IRS alleged that the actual value of personal use exceeded that charged by the company and the differential constituted wages to the employees.

The Seventh Circuit relied on this Court's decision in *Central Illinois Public Service Co. v. United States,* 435 U.S. 21 (1978), in determining that the congruence of the definition of wages for FICA, FUTA, and income tax purposes necessitated exclusion of items from FICA and FUTA wages that were excluded from income taxation.

As detailed in the "Interest of the Amici" section, *supra,* one recent case involved a factual situation similar

to that of the *amici* herein. In *Hotel Conquistador v. United States, supra,* the Court of Claims determined that the value of meals should be excluded from FICA taxation. However, the IRS issued a notice of non-acquiescence, Rev. Rul. 8041, 1980-1 C. B. 211, and continues to collect taxes from hotel and casino employees despite the court ruling. *Hotel Conquistador* held that the meals in question were not remuneration, and therefore were not wages subject to FICA and FUTA taxation. The court rejected the argument that meals were part of a "total package of remuneration" provided to employees:

> [E]ven the Treasury does not contend that every expense incurred by the employer that tends to make the job more acceptable to the employee, constitutes "remuneration" and "wages."

597 F.2d at 1352. Although the Court did not rely solely on the statutory convenience of the employer test, which is not directly applicable to FICA taxes, it did undertake a similar analysis in examining whether meals are remuneration. 597 F.2d at 1353.

The final case that the *amici* will examine in detail is this Court's decision in *Central Illinois Public Service Co. v. United States, supra.* The issue of this case was whether lunch expense reimbursements of employees who were on company travel but not away overnight, were wages for income tax withholding purposes. The Court emphasized that "wages" was a narrower concept than "income," and items that might be taxable as to the employee were not necessarily included in the employer's obligation to withhold taxes on "wages." Wages means remuneration for services performed by an employee for his employer, while many other items may be included in the term "income." 435 U.S. at 25. The Court's conclusion that lunch reimbursements were *not* included in wages for withhold-

ing purposes is directly applicable here since the definition of wages is virtually identical under all the statutes. See *Royster v. United States, supra.*

C. *Principles of statutory construction refute the Fifth Circuit's holding in this case.*

Interpretation of the term "wages" as meaning the same for FICA purposes as for income tax withholding purposes is consonant with the principles of statutory construction. It is presumed that the same words used in different parts of an act have the same meaning, and this natural presumption applies to the Internal Revenue Code unless the commissioner presents evidence to justify a departure from it. *Hotel Equities Corp. v. Commissioner,* 546 F.2d 725 (7th Cir. 1976). *See also Atlantic Cleaners & Dryers, Inc. v. United States,* 286 U.S. 427 (1932). As the Court of Claims stated in *Southern Natural Gas Co. v. United States,* 412 F.2d 1222, 1266 (Ct. Cl. 1969), "All the sections of the [Internal Revenue] Code must be read together to avoid conflict and achieve a harmonius, rational result." *Accord, Helvering v. Credit Alliance Corp.,* 316 U.S. 107 (1942). Furthermore, the Court should not be concerned with whether additional revenue will be generated in the construction of tax statutes. *Caruth v. United States,* 566 F.2d 901 (5th Cir. 1978). The virtually identical definition of wages under I.R.C. §§ 3401, 3121, and 3141, and the lack of relevant differences in purpose between the sections, lead to the conclusion that *Central Illinois'* exclusion of the value of meals should be applied to FICA and FUTA taxes.

CONCLUSION

Many thousands of employees and employers will be affected by this Court's determination. Although the individual's tax impact is small, the cumulative effect will be significant.

For the above reasons, the employees who are *amici* herein respectfully urge this Court to reverse the decision of the Fifth Circuit Court of Appeals and eliminate confusion in the administration of the tax laws by declaring that "wages" has the same meaning for purposes of all the employment tax provisions of the Internal Revenue Code.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN HARTFORD, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MEMORANDUM FOR THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN HARTFORD, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Young Men's Christian Association of Metropolitan Hartford, Inc. ("YMCA of Metropolitan Hartford"), with the consent of the parties, submits this Memorandum as *Amicus Curiae* in support of the petitioner.

INTEREST OF THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN HARTFORD, INC.

The YMCA of Metropolitan Hartford, Inc. is a not-for-profit corporation that is exempt from federal income tax but is subject to Social Security ("FICA") taxes.

The YMCA of Metropolitan Hartford, Inc. is a party to litigation in the United States Court of Claims involving essentially the identical legal question presented by this case.

YMCA of Metropolitan Hartford, Inc. in *Young Men's Christian Association of Metropolitan Hartford, Inc.* v. *United States,* (Ct. Cl. No. 371-79T), seeks a refund of FICA taxes paid (as a result of deficiencies asserted by the Internal Revenue Service) with respect to the value of meals and lodging provided to resident summer camp staff. That action was brought as a test case on behalf of hundreds of YMCA summer camps nationwide. The YMCA of Metropolitan Hartford, Inc., and certain other YMCA organizations, operate summer camps virtually all of which are located in rural areas miles away from commercial eating and lodging facilities. These YMCA organizations require certain employees to reside on the camp premises and to dine with the campers. The YMCAs provide meals and lodging to these employees without charge for the convenient and efficient operation of the summer camps. The YMCA's situation is similar to the petitioner's situation in this case in that the Internal Revenue Service has not claimed that the value of the meals or lodging provided as a convenience to the employer is subject to income tax withholding. However, the Service has claimed that the value of such meals and lodging constitutes wages for FICA tax purposes.

SUMMARY OF ARGUMENT

The federal employment tax system imposes four taxes upon employees and employers. The term "wages" carries an enormous significance to every employer because each of the four employment taxes bases an employer's obligation to withhold and pay federal employment taxes on the meaning of "wages." If the definition of "wages" changes, so does the obligation of every employer.

Legislative history under the federal employment tax acts demonstrates Congressional intent to adopt a common definition for the term "wages" to confine the scope of employers' obligations. "Simplicity and ease of administration" provided the underpinnings of the withholding tax system. S. Rep. No. 221, 78th Cong., 1st Sess. at 17. The government and the court below would not only ignore Congressional intent but also judicial precedent and administrative pronouncements that

have recognized that noncompensatory payments to employees made in furtherance of the employer's business do not fall within the category of "wages" for federal employment tax purposes.

The court of appeals below premised its expansion of the definition of "wages" for FICA and FUTA purposes upon the erroneous assumption that such an expansion would further the underlying purpose of the social security and unemployment insurance system. The result, however, could be exactly the opposite. The government, with the aid of the decision of the court below, would not only substitute confusion for the avowed objectives of simplicity and administrative ease but also would place hundreds of employers in violation of the employment tax provisions. Gov't. Pet. at 11.

ARGUMENT

I.

THE TERM "WAGES" HAS THE SAME BASIC MEANING FOR ALL EMPLOYMENT TAXES

The federal employment tax system imposes four taxes upon employees and employers. Two taxes are imposed under the Federal Insurance Contributions Act ("FICA"). One FICA tax is imposed upon an employee by requiring his employer to withhold the tax from the employee's "wages," §§ 3101, 3102;[1] and a separate FICA tax is imposed directly upon the employer based upon the "wages" paid to an employee. § 3111. The Federal Unemployment Tax Act ("FUTA") imposes a tax directly upon the employer, based upon "wages" paid to an employee. § 3301. Finally, section 3402 imposes an additional obligation upon an employer to withhold income tax from "wages" paid to an employee.

A. Congress Intended the Definition of "Wages" to Be Virtually Identical for All Federal Employment Taxes.

Congress defined the term "wages" in each employment tax provision with nearly identical language.

Both FICA and FUTA define "wages" as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash . . ." (§§ 3121(a) and 3306(b)) and both define "employment" as "any service . . . performed . . . by an employee for the person employing him" (§§ 3121(b) and 3306(c)). The income tax withholding provision defines the term "wages" as "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash. . . ." (§ 3401(a)).

---

[1] All section references are to the Internal Revenue Code of 1954, Title 26 U. S. C. (1976), unless otherwise indicated.

The first employment tax withholding provision was enacted by the Social Security Act of 1935. 49 Stat. 622. Income tax withholding was proposed by the Treasury and passed by the House as part of the Revenue Bill of 1942, H. R. 7378, 77th Cong., 2d Sess., but was subsequently eliminated by the Senate. Instead, Congress enacted a "temporary" withholding to collect the "Victory Tax" enacted by the Revenue Act of 1942, 56 Stat. 798 (1942). In the following year Congress enacted a permanent income withholding provision as part of the Current Tax Payment Act of 1943, 57 Stat. 126 (1943). The withholding structure enacted in 1943 continues essentially unchanged under the present Internal Revenue Code of 1954.

The legislative histories of both the Revenue Act of 1942 and the Current Tax Payment Act of 1943 demonstrate that Congress intended to adopt the same definition for the term "wages" for income tax withholding as it adopted for the Victory Tax and the Social Security Act of 1935.

i. Revenue Act of 1942

As originally proposed by the Treasury and passed by the House of Representatives, the Revenue Bill of 1942 provided for withholding of income tax at the source upon "wages, salaries, corporation dividends and corporation bond interest." Revenue Bill of 1942, H. R. 7378, 77th Cong., 2d Sess. § 153. As an alternative, the Senate proposed a "Victory Tax" upon income which required withholding of tax only upon "wages." S. Rep. No. 1631, 77th Cong., 2d Sess. 165-72 (1942). Both the House Ways and Means Committee and Senate Finance Committee intended the term "wages" to have precisely the same coverage as the term had for social security purposes:

> "The term 'wages' as used in the supplement is defined in section 425(b). It includes all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer. Remuneration received for certain types of services, however, is excepted and is not subject to withholding ... *These*

> *exceptions are identical with the exceptions extended to such services for social security tax purposes and are intended to receive the same construction and have the same scope.*" (H. R. Rep. No. 2333, 77th Cong., 2d Sess. (1942) at 126 (emphasis added); S. Rep. No. 1631, 77th Cong., 2d Sess. at 166, contains substantially identical language.)

Throughout the legislative history to the Revenue Act of 1942, the House and Senate Committees demonstrated their intention to:

> "simplify the process of collection at the source and help to minimize the requirements for additional business machines by employers charged with the duty of collecting and accounting for the tax." S. Rep. No. 1631, *supra,* at 171.

Such simplification resulted in part from adopting the identical definition of wages used for social security purposes.

In conference, the House's provision for income tax withholding was deleted in favor of the Senate's Victory Tax provisions, but the basic definition of wages remained unchanged. Revenue Act of 1942, 56 Stat. 798 (1942).

ii. Current Tax Payment Act of 1943

The Current Tax Payment Act of 1943, Act of June 9, 1943, 57 Stat. 126, § 1621, applied the Victory Tax withholding provisions to the income tax and made withholding permanent. The House Committee adopted the then-existing concept of "wages" to implement a pay-as-you-go program of tax payment:

> "*The general definition of the term 'wages' contained in section 465(a) is the same as that contained in existing law.* The term is generally defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer. Certain of the exceptions provided in the existing law with respect to remuneration paid for given types of services are contained in identical language." (H. R. Rep. No. 268, 78th Cong., 1st Sess. (1943) at 14 (emphasis added).)

The Senate reemphasized the fact that the then-existing definition of "wages" had not changed. The Senate Report contains language substantially identical to the House Report. S. Rep. No. 221, 78th Cong., 1st Sess. (1943) at 17.

The Current Tax Payment Act of 1943, 57 Stat. 126, incorporated this definition of wages for withholding purposes. H. R. Rep. No. 401, 78th Cong., 1st Sess. (1943) at 22. Although additional language was added to the bill to clarify certain exceptions, the basic definition of "wages" was never changed.

In response to objections raised by employers not wishing to be conscripted as collection agents, Congress simplified the withholding process by coordinating the income tax withholding structure with the then existing Social Security tax structure.

> "Your committee bill adopts the basic system of collection at source as provided in the House bill but makes a number of technical changes which are explained below. *Under the bill as reported by your committee, the methods of collection, payment, and administration of the withholding tax have been coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal has been made in order to facilitate the work of both the Government and the employer in administering the withholding system.*" S. Rep. No. 221, *supra*, at 17 (emphasis added).)

The conference report further demonstrates that Congress ntended to coordinate the income tax withholding provisions vith those of the Social Security tax in order to facilitate the ıdministration of the withholding system:

> "The Senate bill adopts the basic system of collection at source as provided in the House bill but makes a number of technical changes which are explained below. Under the bill as passed by the Senate, the methods of collection, payment, and administration of the withholding tax were coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. *This proposal was made in order to facilitate the work of both the Government and the employer in administering the withholding system.*" (H. R. Rep. No. 510, 78th Cong., 1st Sess. (1943) at 28 (emphasis added).)

The conference committee specifically rejected the House's ɔroposal for computing withholding (requiring different rates ;o be applied to different portions of wages) in favor of the Senate bill's single bracket, single percentage, withholding:

> "the employer will not be required to make two separate computations and add the result of each in order to arrive at the amount of tax required to be withheld from any one employee." (*Id.* at 33.)

Unless the definition of "wages" is the same for FICA, FUTA and income withholding taxes, an employer would have to calculate separately three different amounts as wages. This would impose a burden on employers that Congress specifically intended to avoid.

iii. Impact of the Central Illinois Decision on the Definition of Wages

In *Central Illinois Public Service Co.* v. *United States,* 435 U. S. 21 (1978), this Court held that cash reimbursements paid to employees for meal expenses did not constitute "wages" subject to federal income tax withholding even though the reimbursements represented income to the employees. The

Court considered the nature of the employer's withholding obligation under § 3402, and the fact that Congress, in the interest of simplicity and ease of administration, confined the term "wages" to a narrow and precise standard:

> "An expansive and sweeping definition of wages, such as was indulged in by the Court of Appeals, 540 F. 2d, at 302, and is urged by the Government here, is not consistent with the existing withholding system. . . . Congress chose simplicity, ease of administration, and confinement to wages as the standard in 1942. This was a standard that was intentionally narrow and precise. It has not been changed by Congress since 1942, although, of course, as is often the case, administrative and other pressures seek to soften and stretch the definition." (435 U. S. at 31.)

After holding that the reimbursements at issue were not "wages" subject to withholding, this Court noted that Congressional action, not administrative or judicial action, would be necessary to expand that definition:

> "This is not to say, of course, that the Congress may not subject lunch reimbursements to withholding if in its wisdom it chooses to do so by expanding the definition of wages for withholding. It has not done so as yet. And we cannot justify the Government's attempt to do so by judicial determination." (435 U. S. at 33.)

While FICA and FUTA taxes were not at issue in *Central Illinois,* they too are collected solely on "wages." The only difference in the "wage" definition among the three statutes is a stylistic difference. The withholding statute uses the phrase "all remuneration for services performed by an employee for his employer," whereas the FICA and FUTA statutes state "all remuneration for employment." "Employment" is defined by FICA and FUTA as "any service, of whatever nature, performed . . . by an employee for the person employing him. . . ." §§ 3121(b) and 3306(c).

In light of the legislative history under the employment tax acts, this extremely slight variation in statutory wording certainly does not support the major difference in approach to the FICA and FUTA statutes advocated by the government and the court below.

Other courts considering this matter, before and after *Central Illinois,* have concluded that the term "wages" has equivalent scope under FICA, FUTA and income tax withholding.

In *Royster Co.* v. *United States,* 479 F. 2d 387 (4th Cir. 1973), the Court of Appeals held that reimbursements paid by the taxpayer to its salesmen for their meal expenses while on the road were *not* wages for FICA, FUTA or income tax withholding purposes. The Fourth Circuit reviewed the definition of wages under the three employment tax statutes and concluded:

> "The district court was properly of opinion that the slight variations in the wording of the above statutes were inconsequential and that wages has the same essential meaning under all the statutes here in question. *The government in its brief agrees with this determination.* Thus, the case turns not upon any factual dispute but upon a reading of the pertinent statutes and the meaning to be given the term 'wages'." (479 F. 2d at 390 (emphasis added).)

This Court granted certiorari in *Central Illinois* because of the apparent conflict between the Seventh Circuit in that case and the decision of the Fourth Circuit in *Royster.* 435 U. S. at 24. While admittedly the *Central Illinois* case dealt only with income tax withholding, it was the *Royster* decision that this Court let stand. Nothing in the *Central Illinois* opinion suggests a different result would have been reached with respect to FICA and FUTA taxes, had they been an issue.

Following *Central Illinois,* in *Oscar Mayer & Co., Inc.* v. *United States,* unreported decision, 79-2 USTC ¶ 9572 (W. D.

Wis. 1979), *aff'd,* 623 F. 2d 1223 (7th Cir. 1980), the district court held that the value attributable to the personal use of company cars was not "wages" for purposes of FICA, FUTA or income tax withholding, and emphasized the unitary nature of the term "wages":

> "To hold that the slight differences in the wording of the definitions of wages constitutes a difference in intent would prevent employers from being able accurately to predict what should be withheld for income tax purposes and what should be withheld for FICA and FUTA purposes. Such a result would be unfair. Therefore, this Court holds that the slight variations in the statutes are inconsequential and the word 'wages' has the same essential meaning under all the statutes here in question. In reaching this decision, the Court is in agreement with the finding of the Fourth Circuit in *Royster Company* v. *United States,* 479 F. 2d 387 (4th Cir. 1973)." (*Oscar Mayer & Co., Inc.* v. *United States,* 79-2 USTC at 88,084 (opinion of Warren, D.J.).)

The Seventh Circuit Court of Appeals affirmed *Oscar Mayer,* specifically agreeing with this Court and the Fourth Circuit that the term "wages" is a unitary concept:

> "We are aware that the purposes of FICA and FUTA and the collection practices under their withholding provisions are in some respects different from those in the income tax laws. . . .
>
> "The seemingly inconsequential differences in statutory language belie an assertion that Congress intended to adopt broad policy differences in establishing the various withholding programs. Since there has been no showing by the Government to the contrary, *we conclude the Congress' use of the term 'wages' in both contexts reflects an intent that the term be construed for FICA and FUTA purposes congruently with the manner Central Illinois prescribes for the income tax provisions." (Oscar Mayer & Co., Inc.* v. *United States,* 623 F. 2d at 1226-27 (emphasis added).)

In *Hotel Conquistador, Inc.* v. *United States,* 597 F. 2d 1348 (Ct. Cl. 1979), cert. denied, 444 U. S. 1032 (1980), the Court of Claims held that meals provided free to casino employees "were not 'remuneration' and, therefore, not 'wages' " for FICA and FUTA purposes. 597 F. 2d at 1350. The Court of Claims agreed with the Fourth Circuit's view in *Royster* v. *United States,* 479 F. 2d 387 (4th Cir. 1973) that the term "wages" means the same thing for all employment tax purposes. The court went on to note the need for simplicity and ease of administration in the determination of the withholding, collection and payment of tax liability and stated that:

> "not . . . every expense incurred by the employer that tends to make the job more acceptable to the employee, constitutes 'remuneration' and 'wages'." (597 F. 2d at 1352.)

The government recognizes that the meals and lodging furnished by petitioner in this case and Amicus Curiae in its case were at the convenience of the employer and, thus, did not constitute "wages" subject to income tax withholding. It follows from the above discussion that the same meals and lodging cannot be "wages" for FICA or FUTA tax purposes.

II.

MEALS PROVIDED FOR THE EMPLOYER'S CONVENIENCE ARE NOT REMUNERATION AND, THUS, CANNOT BE TAXABLE WAGES FOR PURPOSES OF EITHER WITHHOLDING TAX LIABILITY OR COMPUTATION OF BENEFITS UNDER FICA AND FUTA

The term "wages" has consistently "meant remuneration '*if* paid for services performed by an employee for his employer.' " *Central Illinois, supra,* 435 U. S. at 27. Remuneration is the basic condition and key to producing wages under all three employment tax statutes. As long as the employer is *not* seeking to *compensate* the employee but is rather providing a benefit to the employee for the employer's own purposes, the concept of remuneration does not exist with respect to such benefits[2] and the items are not wages. *See, Commissioner* v. *Kowalski,* 434 U. S. 77 at 88 n. 21 (1977).

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[2] The court below has presented no valid reason why noncompensatory amounts should constitute "wages" for purposes of Social Security and unemployment benefits in order to increase the

Footnote continued on next page.

Section 3401(a) confines the definition of "wages" to "remuneration ... for services performed." Both FICA and FUTA define "wages" as "remuneration for employment." The theme underlying the Treasury regulations, administrative pronouncements and court decisions considering the term "wages" is that payments made or benefits bestowed upon an employee for noncompensatory business reasons of the employer—*i.e.*, in furtherance of the employer's business—cannot be characterized as remuneration for service performed, which is the crucial determination under all three employment tax acts.[3]

Footnote continued from previous page.

amount of benefits credited to an employee's account. Congress determined that *"remuneration"* for employment (wages) should determine the amount of Social Security and unemployment benefits. 49 Stat. 636 §§ 215 and 209, 42 U. S. C. §§ 415 and 409 (1979 Supp.).

[3] Courts have found meals or lodging to be wages for FICA and FUTA withholding *only in cases where the court found the benefits were, as a matter of fact, furnished as additional compensation* (i.e., not for the convenience of the employer). *See, S. S. Kresge Co.* v. *United States,* 218 F. Supp. 240 (E. D. Mich. 1963) and *S. S. Kresge Co.* v. *United States,* 379 F. 2d 309 (6th Cir. 1967) (lunch counter employees received free meal only in exchange for voluntary agreement to be available for work during employee's lunch hour, when they were not otherwise required to be available); *Pacific American Fisheries, Inc.* v. *United States,* 138 F. 2d 464 (9th Cir. 1943) (board and lodging provided to nonresident cannery workers in exchange for less pay than received by workers not receiving the benefits) and *Goldsboro Christian Schools, Inc.* v. *United States,* unreported decision, 79-1 USTC ¶ 9266 (E. D. N. C. 1978) (free housing provided to college teachers who were not required to perform any particular duties in the homes).

The Internal Revenue Service has also held that various items are *not* wages for *FICA, FUTA* or income tax withholding purposes, although the benefits were provided within the employment relationship. For example in *Rev. Rul. 76-71,* 1976-1 C. B. 308, the Service held that tuition reimbursements paid to employees for taking business related educational courses were not wages. In *Rev. Rul. 76-548,* 1976-2 C. B. 308, the Service held that cash allowances paid to miners for protective clothing were not wages.

In each of the decisions discussed above at pp. 8-13, as in the instant case, the benefits provided by the employers to its employees were not intended to be for, and were not measured by, services performed. As the court below stated:

> "The decision to afford these services (meals and lodging) was reached unilaterally by Rowan for its own economic reasons without either individual or collective bargaining. Identical meals and facilities are provided to all employees regardless of their status or rate of pay. An employee who for any reason does not elect to eat the meals furnished does not receive an allowance in lieu of them." (624 F. 2d at 702.)

These specific findings of the court below demonstrate conclusively that the meals and lodging provided to Rowan's employees cannot be characterized as remuneration for services performed. In holding that petitioner's policy, established for noncompensatory business reasons to further its business, results in "remuneration for employment," the court below departs from the realities of business life and stretches the statutory meaning of the term "wages."

The decision of the court below apparently was based on the court's own concept of "remuneration for employment" without regard to the statute, Congressional intent or the all-important consideration of establishing a system that will operate simply and fairly.

As discussed above (pp. 4-8), Congress elected to establish an intentionally narrow and precise scope to employers' obligations under the employment tax system because it served "the interest of simplicity and ease of administration." The present employment tax system works well because employers' obligations intentionally are simple and unambiguous. However, an indiscriminate extension of the employment tax system, as proposed by the government and the court below, creates

difficulties that are far-reaching. Employers would be forced to speculate at their own risk not only as to items subject to employment taxes but also to the value of those items.[4]

The court below obviously failed to appreciate the confusion it would introduce for employers when it extended the definition of "wages" to encompass virtually every economic benefit attributable to, or arising out of, the employment relationships. The court below apparently is telling employers that they may have employment tax obligations on other non-cash items (which may or may not be susceptible of valuation) which Congress and the Internal Revenue Service have not yet determined are taxable.[5]

The impact of the lower court's decision would be to place numerous employers in violation of the employment tax provisions and effect a radical overhaul of the employment tax system. The government's census (Gov't Pet. at 11) includes only those cases with the "meal-as-wage" issue. The number of pending cases would greatly increase if employers are required to guess as to what other items would be subject to employment taxes. The employment tax system was never intended to operate as the court below assumed.

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[4] The question of valuation becomes important in situations where employees are required under the terms of their employment agreement to reside on the employer's premises or dine at the employer's facilities. Certain employees may find "forced" indulgence to be an obligation rather than an economic benefit.

[5] These benefits include the so-called "fringe benefits" such as free parking, health services, use of company automobile, cafeterias, gymnasiums, etc. Congress and the Internal Revenue Service have been unable to articulate which of these benefits should be taxed. Former Treasury Secretary G. William Miller in a letter addressed to House Ways and Means Committee Chairman Daniel Rostenkowski referred to this problem: "The absence of national guidelines has seriously hampered the administration of the tax law, leading to uneven and inconsistent results." Daily Tax Rep. (BNA) No. 11, at J-14 (January 16, 1981).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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Internal Revenue Code of 1954 (26 U.S.C.) (1976):

SECTION 3101. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance*—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * *

(b) *Hospital Insurance*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * *

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. . . .

* * * *

SECTION 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * *

(b) *Hospital Insurance*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121 (b))—

* * * *

SECTION 3121. DEFINITIONS.

(a) *Wages*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

* * * *

SECTION 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

* * * *

SECTION 3306. DEFINITIONS.

(b) *Wages*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; . . .

* * * *

SECTION 3401. DEFINITIONS.

(a) *Wages*—For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; . . .

SECTION 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding*—Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables . . .